This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

CT
ACG
AAW
v. 2

WOOD'S

COLLYER

ON

THE LAW OF PARTNERSHIP.

WITH AN

APPENDIX OF FORMS

BY

JOHN COLLYER,
OF LINCOLN'S INN, ESQ., BARRISTER AT LAW.

WITH ADDITIONS FROM LINDLEY AND OTHER ENGLISH AUTHORS,

AND

FULL AMERICAN NOTES AND REFERENCES TO AMERICAN CASES,

BY H. G. WOOD,
AUTHOR OF "THE LAW OF NUISANCES," "THE LAW OF MASTER AND SERVANT," "THE LAW OF FIRE-INSURANCE" ETC., ETC.

Vol. II.

ALBANY, N. Y.
W. C. LITTLE & CO., LAW BOOK PUBLISHERS,
425 BROADWAY.
1878.

137204

APR 26 1951

Entered, according to act of Congress, in the year eighteen hundred and seventy-eight,
BY HORACE G. WOOD,
In the office of the Librarian of Congress, at Washington.

WEED, PARSONS AND COMPANY,
PRINTERS AND ELECTROTYPERS,
ALBANY, N. Y.

TABLE OF CONTENTS.

CHAPTER XXIII.

INCOMING PARTNERS.

SEC. 515. Of the liabilities of an incoming partner—Sherreff v. Wilks.
SEC. 516. Payment of interest by new firm on debt of old firm does not necessarily bind new partner—Kirwan v. Kirwan.
SEC. 517. Commencement of liability in ordinary partnership.
SEC. 518. Firm as such not liable for acts done before it was formed.
SEC. 519. Rule in Wilson v. Whitehead.
SEC. 520. Rule in Saville v. Robertson.
SEC. 521. Rule in Gouthwaite v. Duckworth.
SEC. 522. Principle applies to incoming partners.
SEC. 523. Rule in Ex parte Jackson—Beale v. Mouls.
SEC. 524. Liability arising from tacit contract—Dyke v. Brewer.
SEC. 525. May make himself liable by agreement.
SEC. 526. Instances in which liability was created.
SEC. 527. Note or bill given for debt of old firm, in name of new, *prima facie* a fraud on the new partner.
SEC. 528. Introduction of new partner—firm bound to let in, when—rights of new partner when not provided for in articles.
SEC. 529. Must not be joined as party plaintiff or defendant in suits relating to business of the old firm.
SEC. 530. Evidence of assumed obligation to pay.
SEC. 531. Rule in Helsby v. Mears.
SEC. 532. Must be *novatio debiti*—Vere v. Ashby.
SEC. 533. What amounts to a novation.
SEC. 534. When incoming partner is not liable.
SEC. 535. Where an infant partner may become liable.

CHAPTER XXIV.

RETIRING PARTNERS.

SEC. 536. Liabilities of retiring partners.
SEC. 537. Rule as to original creditors.
SEC. 538. Permitting name to be used after retirement.
SEC. 539. Rule as to dormant partners.
SEC. 540. Liability for special contracts.
SEC. 541. Not generally bound by new contracts—Pindar v. Wilks.
SEC. 542. Not bound by instruments negotiated after dissolution—Abel v. Sutton.

SEC. 543. Rule in Kilgour v. Finlyson.
SEC. 544. May give power to remaining partners to indorse in name of old firm.
SEC. 545. Acceptances in name of old firm not binding.
SEC. 546. Wrightson v. Pullan; Usher v. Dauncey.
SEC. 547. Effect of dissolution upon interest of partners in the firm property.
SEC. 548. How he may be discharged from contract—Clayton's case.
SEC. 549. Rule in Brooke v. Enderby.
SEC. 550. In case of a continuance of new partnership—Newmarch v. Clay.
SEC. 551. Money of new partnership applicable only to debts of new firm—Thompson v. Brown.
SEC. 552. Appropriation of payments by the payee. Simpson v. Ingham.
SEC. 553. Contract of remaining partners to pay old debts, effect of.
SEC. 554. When creditors accept the remaining partners. Bedford v. Deakin.
SEC. 555. When bill or note is indorsed with reservation of all rights. Featherstone v. Hunt.
SEC. 556. Where the creditors accept new security. Evans v. Drummond.
SEC. 557. Rule in Reid v. White.
SEC. 558. Taking sole security of new firm no written security previously existing. Thompson v. Drummond.
SEC. 559. Ex parte Whitmore.
SEC. 560. Rule when creditors agree that retiring partner shall be simply surety for old firm. Oakley v. Parsheller.
SEC. 561. Retiring partner under some circumstances becomes surety merely.
SEC. 562. Where the creditors receive interest of the new firm—Gough v. Davies.
SEC. 563. When the creditor continues trading with the new firm—David v. Ellice.
SEC. 564. Lodge v. Dicas.
SEC. 565. Lodge v. Dicas and David v. Ellice, overruled by Thompson v. Percival, Kirwan v. Kirwan, and Hart v. Alexander.
SEC. 566. Thompson v. Percival.
SEC. 567. Kirwan v. Kirwan.
SEC. 568. Hart v. Alexander.
SEC. 569. Money borrowed of a trustee who is a partner—Dickinson v. Lockyer.
SEC. 570. Retirement of a partner with knowledge of firm's insolvency—Anderson v. Maltby.
SEC. 571. Termination of liability in ordinary partnerships.
SEC. 572. Termination of liability as to future acts.
SEC. 573. Retirement of dormant partner.
SEC. 574. Rule in Heath v. Sanson.
SEC. 575. Dissolution and notice, effect of.
SEC. 576. Instances where notice does not protect from liability.
SEC. 577. Rights of partners after dissolution—Lyons v. Haynes, Butchart v. Dresser, Ault v. Goodrich.
SEC. 578. What amounts to notice of dissolution.
SEC. 579. Termination of liability as to past acts.
SEC. 580. Payment.
SEC. 581. Rule in Clayton's case.
SEC. 582. Rule in Sterndale v. Hawkinson.
SEC. 583. Rule in Brooke, v. Enderbey.
SEC. 584. Rule in Newmarch v. Clay.
SEC. 585. Application of the rules adopted in the preceding cases.

SEC. 586. Illustration—Beale v. Caddick.
SEC. 587. Simpson v. Ingham.
SEC. 588. Partner may bind firm by assenting to transfer of debts due from or to it.
SEC. 589. Illustration—Wickham v. Wickham.
SEC. 590. Application of payments.
SEC. 591. Release.
SEC. 592. Rule in Solly v. Forbes, Price v. Baker, Hartley v. Manton.
SEC. 593. Substitution of debtors and securities by agreement.
SEC. 594. Agreement of creditors to look to remaining partners is valid.
SEC. 595. Cases in which a retiring partner has not been discharged, no new partner having been brought into the firm.
SEC. 596. Cases in which a retiring partner has not been discharged, although a new partner has been brought into the firm.
SEC. 597. Cases in which a retiring partner has been held discharged.
SEC. 598. Of the doctrine of merger.
SEC. 599. Cases in which a retired partner has not been discharged, although a new partner has been introduced into the firm.
SEC. 600. Cases in which a retired partner has been held to be discharged.
SEC. 601. Of the doctrine of merger.

CHAPTER XXV.

OF THE LIABILITY OF DECEASED PARTNER'S ESTATE.

SEC. 602. Remedy at law.
SEC. 603. Rule in Gray v. Chiswell.
SEC. 604. Partnership debt, several as well as joint, in equity.
SEC. 605. Rule in Devaynes v. Noble.
SEC. 606. Confirmed in Wilkinson v. Henderson.
SEC. 607. Rule carried still farther in Thorpe v. Jackson.
SEC. 608. Joint and several contracts.
SEC. 609. Rule in equity when partners enter into a joint security.
SEC. 610. Rule does not apply to all transactions—Sumner v. Powell.
SEC. 611. Partnership creditors, rights against a deceased partner's estate—Vulliamy v. Noble.
SEC. 612. Admission of survivor of representatives of a deceased partner—Braithwaite v Britain — Winter v. Innes.
SEC. 613. Subsequent dealings with the new firm.
SEC. 614. Acts in discharge of deceased partner's estate — Jacomb v. Harwood.
SEC. 615. Rule in Winter v. Inness.
SEC. 616. Payments made in case of decease of one of the partners — Devaynes v. Noble.
SEC. 617. Sleech's case — Clayton's case.
SEC. 618. Liability in case of continuance of firm under will of deceased.
SEC. 619. Creditors of new firm not entitled to pursue the estate.
SEC. 620. Ex parte Garland.
SEC. 621. Executor carrying on business liable for excess of authority.
SEC. 622. Rule in Wightman v. Townall.
SEC. 623. Consequences of death of a partner.
SEC. 624. Relative rights of executor and surviving partner.
SEC. 625. With reference to what occurred before death.

SEC. 626. Creditors may pursue estate in equity.
SEC. 627. Position of firm creditors as to individual creditors of deceased partner.
SEC. 628. Rule in Brett v. Beckwith.
SEC. 629. Substance of degree in such cases.
SEC. 630. Questionable whether both remedies can be pursued at once.
SEC. 631. With reference to what occurred after death.
SEC. 632. What acts of an executor impose liability upon assets of deceased partner.
SEC. 633. Cases illustrating.
SEC. 634. Effect of provision in will directing continuance of business.
SEC. 635. In the case of companies.
SEC. 636. Consequences as to separate creditors, legatees and next of kin of deceased partners.
SEC. 637. General rule as to separate creditors.
SEC. 638. Exceptions to the rule.
SEC. 639. When share of deceased is not got in.

CHAPTER XXVI.

EXTINCTION OF LIABILITIES.

SEC. 640. Extinction of liability.
SEC. 641. Composition deed treated as release.
SEC. 642. May be limited to one partner.
SEC. 643. Covenant not to sue not treated as release.
SEC. 644. Payment by one, payment by all.

CHAPTER XXVII.

OF THE RIGHTS OF PARTNERS AGAINST THIRD PERSONS.

SEC. 645. Contract gives no new rights to individuals.
SEC. 646. Limits of rights.
SEC. 647. Under sealed instruments—Bonds—Rule in Wright v. Russell.
SEC. 648. Rule in Barclay v. Lewis.
SEC. 649. Barclay v. Lewis overruled by Barker v. Parker.
SEC. 650. Rule in Strange v. Lee.
SEC. 651 Bond for repayment of money advanced by firm or either member of, does not protect advances by survivor.
SEC. 652. Rule as to bond to cover bills drawn by firm.
SEC. 653. Effect of death or retirement of partner upon bond of indemnity to firm.
SEC. 654. Effect upon such bonds when firm is afterward incorporated.
SEC. 655. Same principles applied in equity—Pemberton v. Oakes.
SEC. 656. Introduction of new partner—Effect of, on such bonds.
SEC. 657. Bond may be made so as to cover fluctuations and changes in composition of the firm.
SEC. 658. Who may recover on bond given to firm in firm name.
SEC. 659. Bonds to companies, not affected by changes in members of.
SEC. 660. What submission to arbitration covers—Garland v. Noble.
SEC. 661. Power of attorney given to one member—Effect of.
SEC. 662. Rights of partners under unsealed contracts. Rule in Ex parte Garland.

SEC. 663. Guaranty given to one partner, not guaranty to firm.
SEC. 664. Simple contracts may be enlarged or explained by construction. Ex parte Kensington.
SEC. 665. Guarantees given to one partner may in some cases be extended to firm—Garrett v. Handley.
SEC. 666. Alexander v. Barker.
SEC. 667. Bills and notes, generally security only to one to whom payable—Exceptions.
SEC. 668. Rule when contract by mistake fails to express the intention of the parties.
SEC. 669. Rights of partners as to accounts current with their debtors—Bodenham v. Purchas.
SEC. 670. Bodenham v. Purchas questioned in Jones v. Maud.
SEC. 671. Of extinction of rights. Payment to and release by one partner. Effect of.
SEC. 672. Payment to one partner—King v. Smith.
SEC. 673. Distinction when the debtor owes both the partner and the firm.
SEC. 674. Judgment taken by one of two joint creditors. Effect of.
SEC. 675. Payment to one of two firms that are partners in certain transactions

CHAPTER XXVIII.

OF ACTIONS BY PARTNERS.

SEC. 676. General rights of partners to sue.
SEC 677. Of parties to action *ex contractu*.
SEC. 678. Must have been partnership when contract was made.
SEC. 679. Distinction between specialties and simple contracts.
SEC. 680. Parties to actions on bills and notes.
SEC. 681. Rights of action cannot be transferred when.
SEC. 682. Parties to actions on deeds.
SEC. 683. Dormant partners.
SEC. 684. Partners not known in firm.
SEC. 685. Infant partners.
SEC. 686. Bankrupt partners.
SEC. 687. Death of partner.
SEC. 688. Demurrer in case it appears there should be other parties.
SEC. 689. Of the parties to an action *ex delicto*.
SEC. 690. Of the declaration.
SEC. 691. Joint interest, joint action.
SEC. 692. Libel.
SEC. 693. Of pleas in bar.
SEC. 694. Of plea of bankruptcy.
SEC. 695. In actions on bonds.
SEC. 696. Tender.
SEC. 697. Former recovery.
SEC. 698. Statute of limitations.
SEC 699. Proof of partnership.
SEC. 700. How proved.
SEC. 701. Nominal partners.
SEC. 702. Declarations of one partner.

SEC. 703. Proof of dissolution.
SEC. 704. Misjoinder may be shown under general issue.
SEC. 705. Evidence in actions for tort.
SEC. 706. Indictment by partners.
SEC. 707. Equitable remedies against partners.

CHAPTER XXIX.

OF ACTIONS AGAINST PARTNERS.

SEC. 708. Of the process.
SEC. 709. Personal service necessary.
SEC. 710. One partner may appear for all.
SEC. 711. Distringas.
SEC. 712. Return of *nulla bona*, or *non est inventus*.
SEC. 713. When defendant is abroad.
SEC. 714. Separate property of one cannot be distrained to compel appearance of the other.
SEC. 715. As to bailable process.
SEC. 716. Full name of defendant shall be given.
SEC. 717. Must be jointly declared against.
SEC. 718. In case of tort.
SEC. 719. Action on bail bond.
SEC. 720. Of parties to action on contract.
SEC. 721. Non-joinder must be plead.
SEC. 722. Separate contract may be declared on, and joint contract proved when.
SEC. 723. When non-joinder may be availed of, although not plead.
SEC. 724. Non-joinder of dormant partner.
SEC. 725. Of infant partner.
SEC. 726. Of bankrupt partner.
SEC. 727. When one is dead.
SEC. 728. Outlawry of one.
SEC. 729. When too many are joined.
SEC. 730. Of parties to actions for torts.
SEC. 731. Of parties to actions *ex quasi contractu*.
SEC. 732. Other actions *ex quasi contractu*.
SEC. 733. All partners must be sued.
SEC. 734. Actions against survivor.
SEC. 735. Should be declared against as survivor.
SEC. 736. Outlawry.
SEC. 737. Non-joinder, matter of abatement only.

CHAPTER XXX.

OF THE PLEADINGS IN.

SEC. 738. Of pleas in abatement.
SEC. 739. For misnomer.
SEC. 740. Plea should be accurate and certain.
SEC. 741. Plea for non-joinder; what must be stated in.
SEC. 742. How must conclude.

SEC. 743. Plaintiff not allowed to amend.
SEC. 744. Demurrer to plea.
SEC. 745. When plaintiff should reply to plea.
SEC. 746. Effect of finding under issue raised by plea and replication.
SEC. 747. Of pleas in bar, nature of.
SEC. 748. Release.
SEC. 749. Covenant not to sue.
SEC. 750. Payment or tender.
SEC. 751. Former recovery.
SEC. 752. Joint and several debts.
SEC. 753. Set-off.
SEC. 754. Torts cannot be set off.
SEC. 755. Must be debts due in same right.
SEC. 756. Enough, if rights are essentially the same.
SEC. 757. Demands essentially separate.
SEC. 758. Effect of agreement to sever.
SEC. 759. Court will sometimes order judgments to be set off.
SEC. 760. Infancy, plea of.
SEC. 761. Bankruptcy.
SEC. 762. Joint tort.
SEC. 763. When defense is joint.

CHAPTER XXXI.

OF THE EVIDENCE.

SEC. 764. Evidence must be sufficient to hold all.
SEC. 765. Strict proof required.
SEC. 766. May be by parol.
SEC. 767. That bills were drawn or accepted in particular way.
SEC. 768. Acts and conduct of the parties.
SEC. 769. Answer to bill in equity, when admissible.
SEC. 770. Records in former suits.
SEC. 771. Declarations or admissions, how far admissible.
SEC. 772. Statements made by others in presence of defendants.
SEC. 773. Admission of one partner.
SEC. 774. Evidence required to sustain plea of non-joinder.
SEC. 775. When admissions of one partner are admissible.
SEC. 776. Admissions after dissolution.
SEC. 777. Admissions by agent after retirement of one partner.
SEC. 778. What must be shown to hold the firm.
SEC. 779. Admission does not make person a partner, may show that he was not.
SEC. 780. When estopped from denying.
SEC. 781. May show admissions had no reference to partnership.
SEC. 782. Rule in Ridgway v. Phillips.
SEC. 783. When one partner may be called to prove partnership.
SEC. 784. Interest of witness.
SEC. 785. No party examined without consent.
SEC. 786. Evidence in actions for tort.

CHAPTER XXXII.

OF NONSUIT; VERDICT; COSTS.

SEC. 787. Nonsuit, when directed.
SEC. 788. Verdict must be for or against all.
SEC. 789. Costs, who entitled to.

CHAPTER XXXIII.

OF EXECUTION.

SEC. 790. Joint execution must be predicated on joint judgment.
SEC. 791. What may be taken on.
SEC. 792. Plaintiff may have several executions.
SEC. 793. Executions in favor of separate creditors.
SEC. 794. As to the interest passed by seizure and sale.
SEC. 795. As to the relief of the solvent partner against the effect of the execution.

CHAPTER XXXIV.

OF SUITS IN EQUITY BY AND AGAINST PARTNERS.

SEC. 796. Who should be parties plaintiff.
SEC. 797. When suit may be maintained against partners.
SEC. 798. Who should be made defendants.
SEC. 799. When separate creditors may bring suit for administrator.
SEC. 800. Who must answer.

CHAPTER XXXV.

OF PARTNERSHIPS IN MINES.

SEC. 801. Subject to rules of ordinary partnership.
SEC. 802. Rights of co-adventurers.
SEC. 803. Rights of mortgagees of shares.
SEC. 804. Shares in, assignable.
SEC. 805. Implied conditions of the relation.
SEC. 806. Person liable as partner in, by holding out, when.
SEC. 807. No implication as to power of directors or agents to draw bills.
SEC. 808. Provisions of codes and ordinances.

CHAPTER XXXVI.

OF PART OWNERS OF SHIPS.

SEC. 809. Of the interest of part owners.
SEC. 810. Of the ship's register.
SEC. 811. What may be registered.

SEC. 812. As to the declaration.
SEC. 813. Contents of certificate.
SEC. 814. Of the ship's transfer.
SEC. 815. Of the material rights of part owners.
SEC. 816. Rights of majority.
SEC. 817. Ship's husband, duties of.
SEC. 818. Duty of part owners as to expenses.
SEC. 819. Rights of, between themselves.
SEC. 820. Relative rights of part owners and third persons.
SEC. 821. Power of agents and part owners as to repairs.
SEC. 822. Distinction between part owners and partners.
SEC. 823. Of actions and suits against partners.
SEC. 824. Who should be sued.

CHAPTER XXXVII.

OF PARTICULAR PARTNERSHIPS.

SEC. 825. Of joint-stock companies in general.
SEC. 826. Of the Bubble Act.
SEC. 827. Later acts.
SEC. 828. Repeal of the statute and its consequences.
SEC. 829. Who are to be treated as usurping powers of a corporation.
SEC. 830. Test of legality as to joint-stock companies.
SEC. 831. What makes one a partner in.
SEC. 832. What constitutes an actual partner in.
SEC. 833. By holding out.
SEC. 834. Liability of promoters or provisional directors.
SEC. 835. Liability of the company.
SEC. 836. Legal remedies affecting companies, members of, and strangers.
SEC. 837. Of the formation of — Evidence to charge one as shareholder.
SEC. 838. Where there has been no waiver of formalities.
SEC. 839 Where the prescribed formalities have been apparently waived.
SEC. 840. As between company and alleged shareholder.
SEC. 841. As between alleged shareholder and a creditor.
SEC. 842. Cost-Book Mining Companies.
SEC. 843. Of chartered companies.
SEC. 844. Of companies under letters patent.
SEC. 845. Of the mutual rights of shareholders.
SEC. 846. When company is projected, but never formed.
SEC. 847. Every party suing must be named.
SEC. 848. Deed of settlement, what it should set forth.
SEC. 849. The general law of partnership applies when the deed of settlement does not provide remedies.
SEC. 850. When shareholders may proceed in equity against the directors.
SEC. 851. Of the relative rights of shareholders.
SEC. 852. Liability of shareholder of unincorporated company.
SEC. 853. Powers of agent or manager of company.
SEC. 854. Unincorporated companies — Liability of.
SEC. 855. Of the management of companies.
SEC. 856. Of companies under 7 & 8 Vict. — Managing body.

SEC. 857. As to shareholders.
SEC. 858. As to managing body.
SEC. 859. As to shareholders of statutory companies.
SEC. 860. Of the sale and transfer of shares.
SEC. 861. Of the relinquishment of shares, and of the right to retire.
SEC. 862. Of the forfeiture of shares and the right to expel.
SEC. 863. Of suits in equity between company and strangers.
SEC. 864. Grounds on which equity will interfere.
SEC. 865. When will enjoin.
SEC. 866. Ex parte injunctions.
SEC. 867. Will restrain company from acting in excess of authority.
SEC. 868. When injunction will be refused.
SEC. 869. Suits in equity among the shareholders of joint-stock companies.
SEC. 870. Dissolution when all partners cannot be present.
SEC. 871. Account without dissolution.
SEC. 872. General discussion of question.
SEC. 873. Demurrer.
SEC. 874. Plea.
SEC. 875. Answer.
SEC. 876. Injunctions against directors, etc.
SEC. 877. An injunction has been refused to restrain.
SEC. 878. Actions at law against companies.
SEC. 879. Of the recovery back of subscriptions to companies.
SEC. 880. Of actions between companies and their shareholders.
SEC. 881. Of actions for calls.
SEC. 882. Of actions for dividends.
SEC. 883. Of set-off, by and against companies.
SEC. 884. Of executions against companies and their shareholders.
SEC. 885. As to executions against company or person named in judgment.
SEC. 886. As to proceedings against shareholders upon judgment against company.
SEC. 887. As to shares.
SEC. 888. Termination of liability.
SEC. 889. When shares in companies are specifically bequeathed.
SEC. 890. Profits — Division of.

CHAPTER XXXVIII.

OF JOINT-STOCK COMPANIES BY STATUTE.

SEC. 891. Statutory companies.
SEC. 892. Banking companies.
SEC. 893. Actions by and against.
SEC. 894. Canal companies.

CHAPTER XXXIX.

OF THE BANKRUPTCY OF PARTNERS.

SEC. 895. Of the consequences of bankruptcy.
SEC. 896. Who are to be deemed bankrupts.
SEC. 897. Who are to proceed against.

SEC. 898. When fiat is void.
SEC. 899. What property passes to assignee.
SEC. 900. Administration under, joint and separate.
SEC. 901. Effect of an act of solvent partner.
SEC. 902. Powers of solvent partner.
SEC. 903. Effect of acts of bankrupt partner on dealings of firm.
SEC. 904. Effect of bankruptcy of one, on execution against firm.

CHAPTER XL.

OF THE ADMINISTRATION IN BANKRUPTCY.

SEC. 905. Of joint and separate estate.
SEC. 906. What is joint estate in bankruptcy.
SEC. 907. Ostensible partners.
SEC. 908. Dormant partners.
SEC. 909. What is separate estate in bankruptcy.
SEC. 910. When separate, is joint estate in bankruptcy.
SEC. 911. Joint estate converted into separate.
SEC. 912. How joint estate may be converted into separate.
SEC. 913. What is essential to make conversion complete.
SEC. 914. All the terms of the contract must be complied with.
SEC. 915. When conversion may be defeated.
SEC. 916. Conversion not defeated by knowledge of the firm that it was insolvent.
SEC. 917. Creditors cannot prevent conversion.

CHAPTER XLI.

OF JOINT AND SEPARATE DEBTS.

SEC. 918. Separate debts, what are.
SEC. 919. How separate debt is converted into joint.
SEC. 920. What amounts to conversion, and how proved.
SEC. 921. Of proof in general. Priority of joint creditors as to joint estate of separate creditors.
SEC. 922. Exceptions to rule as to dividends with separate creditors.
SEC. 923. When a joint creditor is a petitioner under a separate fiat.
SEC. 924. Where there is no joint estate and no solvent partner.
SEC. 925. Where there are no separate debts.
SEC. 926. As to interest.
SEC. 927. When partners may be creditors upon each other.
SEC. 928. Enforcement of joint debts, against whole of deceased partner.
SEC. 929. Of election of remedy.
SEC. 930. Confined to same debt.
SEC. 931. Confined to bonds, bills and personal securities.
SEC. 932. Of election of proof.
SEC. 933. Rule when debt has been converted with or without extinguishment.
SEC. 934. When debt has been collusively converted.
SEC. 935. Rule when dormant and ostensible partners become bankrupts.
SEC. 936. When a demand may be split.
SEC. 937. Of the time of elections and waiver of proof.

SEC. 938. Of double remedy.
SEC. 939. Of double proof.
SEC. 940. Limitations as to double proof.
SEC. 941. Of proof between partners.
SEC. 942. Qualification of the rule.
SEC. 943. Exceptions of a special nature.
SEC. 944. What debts one partner may prove against separate estate.
SEC. 945. When one partner may prove against separate estate, although not sufficient to pay separate debts.
SEC. 946. Rule as to distinct fines.
SEC. 947. When there are no joint debts.
SEC. 948. Of proof between estates.
SEC. 949. Exceptions to rule.
SEC. 950. Rule when one partner is appointed manager of firm business.
SEC. 951. Rule when some of the partners form a distinct firm.
SEC. 952. Of set-off.
SEC. 953. Equitable set-off.

CHAPTER XXIII.

INCOMING PARTNERS.

SEC. 515. Of the liabilities of an incoming partner — Sherreff v. Wilks.
SEC. 516. Payment of interest by new firm on debt of old firm does not necessarily bind new partner — Kirwan v. Kirwan.
SEC. 517. Commencement of liability in ordinary partnership.
SEC. 518. Firm as such not liable for acts done before it was formed.
SEC. 519. Rule in Wilson v. Whitehead.
SEC. 520. Rule in Saville v. Robertson.
SEC. 521. Rule in Gouthwaite v. Duckworth.
SEC. 522. Principle applies to incoming partners.
SEC. 523. Rule in Ex parte Jackson — Beale v. Mouls.
SEC. 524. Liability arising from tacit contract, Dyke v. Brewer.
SEC. 525. May make himself liable by agreement.
SEC. 526. Instances in which liability was created.
SEC. 527. Note or bill given for debt of old firm, in name of new, *prima facie* a fraud on the new partner.
SEC. 528. Introduction of new partner — Firm bound to let in, when — Rights of new partner when not provided for in articles.
SEC. 529. Must not be joined as party plaintiff or defendant in suits relating to business of the old firm.
SEC. 530. Evidence of assumed obligation to pay
SEC. 531. Rule in Helsby v. Mears.
SEC. 532. Must be *novatio debiti* — Vere v. Ashby.
SEC. 533. What amounts to a novation.
SEC. 534. When incoming partner is not liable.
SEC. 535. Where an infant partner may become liable.

Of the liabilities of an incoming partner — Sherreff v. Wilks.

SEC. 515. Generally, of course, an incoming partner will not be liable in respect of debts contracted by the firm previously to his joining it. In Sherreff v. Wilks, the facts of which have been already stated,[1] Lord Kenyon said: "It would be carrying the liability of partners for each other's acts to a most unjust extent, if we suffered a new partner to be bound in this manner for an old debt incurred by other persons." And it has been laid down as a general principle,

[1] 1 East, 48.

that the liability of an incoming partner for contracts made by the firm before his accession is not to be presumed.[1]

Payment of interest by new firm on old debt does not necessarily bind new partner — Kirwan v. Kirwan.

SEC. 516. Even where there is evidence of payment of interest by a new firm for an old debt, the incoming partner, by whose accession the new firm is constituted, will not necessarily be bound thereby. In Kirwan v. Kirwan,[2] it appeared that A kept an account in the nature of a banking account with the firm of B & Co., and annual accounts were rendered to him. During the time that A dealt with the firm all the partners retired except C, who formed a new partnership with K. On the accession of K a large capital was brought into the concern. A's account was then transferred from the books of the old to those of the new partnership, and the balance was struck annually as before, and A, until his death, which happened nearly three years afterward, received sums on account, and interest on his balance from the new firm in the same manner as before. Upon the death of A, his administrators brought an action against the *quondam* partners and C, to recover the balance, and in that action the *quondam* partners contended that their responsibility had shifted to C and K, and it was argued in their behalf that the transfer of the account into the books of the new firm, and the payments of money to A, amounted to evidence against K, that he intended to take the debt upon him. But the Court of Exchequer were of opinion that no inference of that sort could be drawn in the absence of any proof of A's assent to the substitution of K, as his debtor, for the original partners, and Bolland, B., observed further, that there was nothing to show that K undertook to answer for the debts of the old firm, and the probabilities were that he would not incur further responsibilities. And although the account was transferred from the old to the

[1] Catt v. Howard, 3 Stark. 5. It is evident that the incoming partner might assume the debts of the old firm for a consideration, and obligate himself to the members of the old firm, to pay the same. But the general rule is that the incoming partner is not liable for the debts of the old firm. Beale v. Mouls, 10 Q. B. 976; Beech v. Eyre, 5 Man. & G. 415; Whitehead v. Barron, 2 Mood. & R. 248; Young v. Hunter, 4 Taunt. 582; Hart v. Tomlinson, 2 Vt. 101; Sternburg v. Callanan, 14 Iowa, 251; Cadwallader v. Blair, 18 id. 420; Thrall v. Seward, 37 Vt. 573; Hartley v. Kirlin, 45 Penn. 49; Badcock v. Stewart, 58 Penn. St. 179; Deere v. Plant, 42 Mo 60; Adkins v. Arthur, 38 Tex. 431. An incoming partner is not liable for the debt of the old firm unless there is a novation of the debt, by a new promise upon a valid consideration, and a discharge of the old firm therefrom. Sternburg v. Callanan, 14 Iowa, 251; Richardson v. Farmer, 36 Mo. 35.

[2] 2 C. & M. 617, and see Ex parte Sandham, 4 D. & C. 812.

new firm, the learned judge conceived that there might be many ways in which interest might be paid without K being aware of it, and the manner of keeping the accounts led to the supposition that he was not aware of it.

Commencement of liability in ordinary partnerships.

SEC. 517. "The doctrine that each partner has implied authority to do whatever is necessary to carry on the partnership business in the usual way," says Mr. Lindley,[1] "is based upon the ground that the ordinary business of a firm cannot be carried on either to the advantage of its members or with safety to the public, unless such a doctrine is recognized. The existence of a partnership is, therefore, evidently presupposed; and although persons negotiating for a partnership, or about to become partners, *may* be the agents of each other before the partnership commences, such agency, if relied on, must be established in the ordinary way, and is not to be inferred from the mere fact that the persons in question were engaged in the attainment of some common end, or that they have subsequently become partners. This is shown by the cases already referred to, when the difference between partnerships and inchoate partnerships was being discussed. Almost all those cases in fact arose in consequence of attempts made to fasten liability on the defendants, by reason of some act done by other persons, alleged to be their partners, and each of those cases in which the plaintiff failed is an authority for the proposition that so long as there is no partnership there is no implied authority similar to that which exists after a partnership is formed.[2] But although this is undoubted law, still if persons agree to become partners as from a future day, upon terms to be embodied in a deed to be executed on that day, and the deed is not then executed, but they nevertheless commence their business as partners, they will all be liable for the acts of each, whether those acts occurred before or after the execution of the deed.[3] For the question in such a case is not, when was the deed executed? but rather this: when did the partners commence to carry on business as such? The agency begins from that time, whether they choose to execute any partnership deed or not.

Where there is an agreement for a partnership, and there is nothing to lead to the conclusion that the partnership was intended to

[1] Lindley on Part. pp. 312–318.

[2] Gabriel v. Evill, 9 M. & W. 297, where it was held that no partnership existed, the option to become a partner not having been exercised.

[3] Battley v. Lewis, 1 Man. & Gr. 155.

commence at any other time, it will be held to commence from the date of the agreement.[1]

Firm, as such, not liable for acts done before it was formed.

SEC. 518. The agency of each partner for the firm commencing with the partnership, and not before, it follows that the firm is not liable for what may be done by any partner before he becomes a member thereof. So that if several persons agree to become partners, and to contribute each a certain quantity of money or goods for the joint benefit of all, each one is solely responsible to those who may have supplied him with the money or goods agreed to be contributed by him;[2] and the fact that the money or goods so supplied have been brought in by him as agreed, will not render the firm liable.[3]

Rule in Wilson v. Whitehead.

SEC. 519. Upon this principle, apparently, it was held in Wilson v. Whitehead,[4] that the author and publisher of a work were not liable for the paper supplied for it, the paper having been ordered by and supplied to the printer, who was to share the profits of the work. The agreement between the parties was that one should be the publisher, and make and receive general payments; that another should be editor, and that the third should print and find the paper for the work, charging it, however, to the account of the three at cost price. The profits were to be equally divided amongst the three. It was, therefore, urged that all were liable for the paper supplied, but it was held otherwise, for the printer was not authorized to buy the paper except on his own account, and when he had bought it he might have used it for some other book. The case was likened to that of coach proprietors, where each horses the coach for one or more stages, and each agrees to bring into the concern the work and labor of his horses, and none of the others has any interest in them, though all share the profits.[5]

The two well-known cases of Saville v. Robertson[6] and Gouthwaite v. Duckworth[7] further illustrate the principle now in question. The cases closely resemble each other in many respects, for in each there was an agreement for a joint adventure in goods; in each an attempt

[1] See Williams v. Jones, 5 B. & C. 108.

[2] See Greenslade v. Dower, 7 B. & C. 635; Dickinson v. Valpy, 10 B. & C. 141, 142; Fisher v. Taylor, 8 Hare, 229, 230.

[3] Smith v. Craven, 1 Cr. & J. 500; Nicholson v. Ricketts, 8 W. R. 211.

[4] 10 . & W. 503.

[5] Barton v. Hanson, 2 Taunt. 49, which shows that in such a case each is alone liable for hay, etc., supplied to his own horses.

[6] 4 T. R. 720.

[7] 2 East, 421.

was made to compel a person who did not order the goods to pay for them, on the grounds that he was in partnership with the person who did order them, and that they were supplied and used for the joint adventure; and in each the defense was that the goods were ordered before any partnership commenced, so that the defendant was not liable for the purchase made by his copartner. In Saville v. Robertson the defense was proved and prevailed, whilst in Gouthwaite v. Duckworth the defendant was compelled to pay. In order to explain the apparent conflict between the two cases, it is necessary to state shortly the material facts in each.

Rule in Saville v. Robertson.

SEC. 520. In Saville v. Robertson,[1] several persons agreed to share the profit and loss of an adventure in goods, of a kind to be fixed by a majority, but no one was to have any share or proportion in the adventure other than to the amount of the goods ordered and shipped by himself, and no adventurer was to be answerable for any thing ordered or shipped by any coadventurer. One of the adventurers having ordered goods and not paid for them, it was contended that his coadventurers were liable for them, on the ground that he and they were partners. But the court held that no partnership commenced until the goods were on board; each partner was to bring in his share only, and his copartners were not liable to persons who supplied him with the means which enabled him to bring in such share.

Rule in Gouthwaite v. Duckworth.

SEC. 521. In Gouthwaite v. Duckworth,[2] Browne and Powell, who were in partnership, were indebted to Duckworth, and it was agreed that all three should join in an adventure in the purchase and sale of goods; that the goods should be bought, paid for and shipped by Browne and Powell, and that the proceeds of the sale should be remitted to Duckworth, who should deduct thereout the amount of his debt, and then share the profit of the adventure with Browne and Powell. It was also agreed that in the event of a loss Duckworth should share it. In consequence of this agreement, Browne bought goods for the adventure on credit, and it was held that all the three, viz., Browne, Powell and Duckworth, were liable to pay for them; for the goods were bought in pursuance of the agreement for the adventure, and although it was never intended that Duckworth should

[1] 4 T. R. 720. [2] 2 East, 421.

pay for the goods, yet it was thought that the adventure commenced with the purchase of the goods, and that Duckworth was therefore liable. There is considerable difficulty in supporting this decision, if rested on the ground of partnership and implied agency resulting therefrom, for it is not easy to see how any partnership existed prior to the purchase of the goods. But if rested on the ground of agency independently of partnership, there is not the same difficulty. For although the goods were to be paid for by Browne and Powell, that might be regarded as nothing more than a stipulation to take effect as between them and Duckworth; it did not necessarily exclude the inference that as Browne and Powell were to buy for the adventure, they were at liberty to procure the goods on the credit of all concerned.[1]

Principle applies to incoming partners—Young v. Hunter.

SEC. 522. As the firm is not liable for what is done by its members before the partnership between them commences, so upon the very same principle a person who is admitted as a partner into an existing firm does not by his entry become liable to the creditors of the firm for any thing done before he became a partner. Each partner is, it is true, the agent of the firm; but, as before pointed out, the firm is not distinguishable from the persons from time to time composing it, and when a new member is admitted he becomes one of the firm for the future, but not as from the past, and his present connection with the firm is no evidence that he ever expressly or impliedly authorized what may have been done prior to his admission. It may perhaps be said that his entry amounts to a ratification by him of what his now partners may have done before he joined them.[2] But it must be borne in mind that no person can be rendered liable for the act of another on the ground that he has ratified, confirmed, or adopted it, unless, at the time the act was done, it was done on his behalf.[3] Therefore, in Young v. Hunter,[4] where Hunter & Co. had ordered goods of the plaintiff for sale in the Baltic, and afterward it was agreed between Hunter & Co. and Hoffman & Co. that the latter should join in the adventure and share the profit and loss, it was held to be clear that Hoffman & Co. were not liable to the plaintiff to pay for the goods.

---

[1] See Young v. Hunter, 4 Taunt. 582, the judgment of Gibbs, J.

[2] See Horsley v. Bell, 1 Bro. C. C. 101, note, per Gould, J.

[3] Wilson v. Tumman, 6 Man. & Gr. 236, E. C. L. R. 46.

[4] 4 Taunt. 582.

Rule in Ex parte Jackson—Beale v. Mouls.

SEC. 523. So, in Ex parte Jackson,[1] a person who was indebted by bond for money borrowed to carry on a trade, took two other persons ostensibly into partnership. After two years a joint commission of bankruptcy issued against the three, and it was held that the bond debt was not provable as a partnership debt against the joint estate, but remained what it was originally, the separate debt of the obligor.

Again, in Beale v. Mouls,[2] the members of a provisional committee of a company entered into a special agreement with the plaintiff for the manufacture of a steam carriage. Afterward, but before the contract was completed, the defendant Mouls became a member of the committee, and interested himself in the completion of the carriage. Several alterations and payments on account were also made whilst he was a member, and with his knowledge. The carriage was completed but the committee then refused to take it or to pay for it. In an action brought against Mouls and the other members of the committee, it was held that Mouls was not liable. He was not liable on the special contract, for he was no party thereto, by himself or any agent; and he could not be made liable on any implied contract, for the existence of a special excluded any implied agreement relative to the same subject-matter. It follows, from the principles on which this case was determined, that if the carriage had been accepted by the committee, Mouls would not have been liable to pay for it. The delivery and acceptance in such a case would have been in pursuance of the contract, to which, *ex hypothesi* he was no party; and no liability could attach to him by virtue of any implied contract to pay that which became payable by virtue of an express contract made with other people. It has, indeed, been expressly decided, that if several members of a committee order goods, and then a new member joins the committee, he is not liable to pay for the goods, though they are delivered after he joined it.[3]

Liability arising from tacit contract—Dyke v. Brewer.

SEC. 524. Cases, however, of this kind must not be confounded with those in which a new though tacit contract is made after the introduction of a new partner. Dyke v. Brewer[4] illustrates the dis-

[1] 1 Ves. Jr. 131.

[2] 10 Q. B. 976. See, too, Brenmer v. Chamberlayne, 2 Car. & Kir. 569; Kerridge v. Hesse, 9 C. & P. 200.

[3] Newton v. Belcher, 12 Q. B. 921; Whitehead v. Barron, 2 Moo. & Rob. 242. In Beech v. Eyre, 5 Man. & Gr. 415, the goods were both ordered and supplied at a time when there was evidence to show that the defendant was one of the committee.

[4] 2 Car. & Kir. 828.

tinction alluded to. In that case the plaintiff agreed with the defendant, A, to supply him with bricks at so much per thousand, and began to supply them accordingly; the defendant, B, then entered into partnership with A, and the plaintiff continued to supply bricks as before. It was held that both A and B were liable to pay, at the rate agreed upon, for the bricks supplied to both after the partnership commenced. The ground of this decision was, that as A had not ordered any definite number of bricks, each delivery and acceptance raised a new tacit promise to pay on the old terms, although if all the bricks delivered had been ordered by A in the first instance, he alone would have been liable to pay for them.[1]

May make himself liable by agreement.

SEC. 525. If an incoming partner chooses to make himself liable for the debts incurred by the firm prior to his admission therein, there is nothing to prevent his so doing. But it must be borne in mind, that even if an incoming partner agrees with his copartners that the debts of the old shall be taken by the new firm, this, although valid and binding between the partners, is, as regards strangers, *res inter alios acta*, and does not confer upon them any right to fix the old debts on the new partner.[2] In order to render an incoming partner liable to the creditors of the old firm, there must be some agreement to that effect entered into between him and the creditors, and founded on some sufficient consideration. If there be any such agreement, the incoming partner will be bound by it, but his liabilities in respect of the old debts will attach by virtue of the agreement, and not by reason of his having become a partner.

An agreement by an incoming partner to make himself liable to creditors for debts owing to them before he joined the firm, may be, and in practice generally is, established by indirect evidence. The courts, it has been said, lean in favor of such an agreement, and are ready to infer it from slight circumstances,[3] and they seem formerly to have inferred it whenever the incoming partner agreed with the other partners to treat such debts as those of the new firm.[4] But this certainly is not enough, for the agreement to be proved is an agreement with

[1] Helsby v. Mears, 5 B. & C. 504, E. C. L. R. 11, is another case turning on the same principle as is explained by Lord Denman in Beale v. Mouls, 10 Q. B. 976.

[2] See per Parke, J., in Vere v. Ashby, 10 B. & C. 298, E. C. L. R. 21; Ex parte Peele, 6 Ves. 601; Ex parte Williams, Buck. 13.

[3] Ex parte Jackson, 1 Ves. Jr. 131; Ex parte Peele, id. 604.

[4] See Cook's Bank. Law, 534 (8th ed.) citing Ex parte Bingham, and Re Staples; Ex parte Clowes, 2 Bro. (P. C.) 595.

the creditor, and of such an agreement an arrangement between the partners is no evidence.[1]

Instances in which liability was created — Ex parte Whitmore.

SEC. 526. As an instance where an incoming partner made himself liable for debts contracted by the firm before he joined it, reference may be made to Ex parte Whitmore.[2] In that case Warwick and Clagett became partners. Warwick, who had had dealings with merchants in America, informed them that he had taken Clagett into partnership, and requested them to make up their accounts, and transfer any balance due to or from him (Warwick) to the new firm. These instructions were repeated and confirmed by Warwick and Clagett, and were acted on. A debt owing from Warwick was placed to the debit of the new firm, and a bill was drawn on the firm for the amount of the debt and was accepted, but was dishonored. On the bankruptcy of the firm it was held that the debt in question had become the joint debt of Warwick and Clagett, and not only so, but that the joint liability of the two had been accepted in lieu of the sole liability of Warwick.

Note or bill given for debt of old firm, in name of new, prima facie a fraud on new partner.

SEC. 527. Before leaving this subject, it may be as well to observe that, as an incoming partner does not, by the fact of entering the firm, take upon himself the then existing liabilities thereof, if after he has joined the firm his copartner give a bill or note in their and his name for a debt contracted by them alone, this is *prima facie* a fraud upon him, and consequently he will not be liable to a holder with notice.[3]

Introduction of new partners.

SEC. 528. It is a common provision in partnership articles that on the death of a partner, his executors, or his son, or some other person, shall be entitled to take his place. The effect of any such provision must of course depend on its words; but speaking generally, it may be said:

1. That clauses of this kind, although they bind the surviving

[1] Ex parte Freeman, Buck. 471; Ex parte Fry, 1 G. & J. 96; Ex parte Williams, Buck. 13; Ex parte Peele, 6 Ves. 601.

[2] 3 Deac. 365.

[3] See Shirreff v. Wilks, 1 East, 48.

partners to let in the person nominated,[1] do not bind him to come in, but give him an option whether he will do so or not.[2]

2. That before making up his mind he is entitled to make himself acquainted with the state of the partnership affairs, although he is not entitled to have its accounts formally taken.[3]

3. That if he is desirous of coming in, he must comply strictly with the terms upon which alone he is entitled to do so.[4]

4. That if he declines to come in, and there is no provision as to what is then to be done, the partnership must be dissolved and wound up in the usual way.[5]

As a general rule, and excluding cases of agency, an agreement between two persons cannot be enforced against either of them by a third person, even although such third person was intended o derive a benefit from the agreement.[6] In a recent case it was attempted to apply this rule to an agreement between two partners, that on the death of one his widow should succeed him. One of the partners was dead; it was contended that his widow had no right to succeed. But it was held that the rule in question had no application to such a case, that the articles had created a valid trust in favor of the widow, and that she was entitled to come to the court for a decree for the execution of such trust.[7]

In a case where articles provided that in the event of the death of a partner during the term for which the partnership was intended to last, his share should go to his widow for life, and after her death to his children, and in default of children to his widow's executors, administrators or assigns; it was held that the children of a partner, who had died leaving a widow, did not take any vested interest in the partnership assets during her life.[8]

In another case partnership articles provided that on the death of a partner the survivor should carry on the business for the benefit of himself and such person as the other should by will appoint, and, in

---

[1] In Wainwright v. Waterman, 1 Ves. Jr. 311, a person was declared entitled to be admitted, although those with whom that question rested were divided in opinion. But in Milliken v. Milliken, 8 Ir. Eq. 16, it was held that a person who is to be let in, provided he conducts himself to the satisfaction of the survivors, is without remedy if they will not admit him.

[2] Pigott v. Bagley, McCl. & Y. 569; Madgwick v. Wimble, 6 Beav. 495; Downs v. Collins, 6 Ha. 418; Page v. Cox, 10 id. 163; see, too, Pearce v. Chamberlain, 2 Ves. Sr. 33.

[3] Pigott v. Bagley, McCl. & Y. 569.

[4] Holland v. King, 6 C. B. 727; Brooke v. Garrod, 3 K. & J. 608, and 2 DeG. & J. 61; Milliken v. Milliken; see Ex parte Marks, 1 D. & Ch. 499.

[5] Kershaw v. Matthews, 2 Russ. 62; Downs v. Collins, 6 Ha. 418; Madgwick v. Wimble, 6 Beav. 495.

[6] See Colyear v. The Countess of Mulgrave, 2 Keen, 81.

[7] Page v. Cox, 10 Ha. 163.

[8] Balmain v. Shore, 9 Ves. 500.

default of appointment, for the benefit of his widow, or (if she should be dead), for the benefit of his children, and in default of children, for the benefit of his executors or administrators; and that such persons, or the said widow, children, executors, or administrators, should stand in the place of the deceased, and be entitled to the same share in, and have the same control over the partnership trade and assets as the deceased would himself have been entitled to, if living. It was held that this was not, technically speaking, a power of appointment, and that consequently a partner could bequeath his share by a will which did not allude to the power or to the partnership.[1]

When a person has been admitted into an existing firm, and no express agreement has been made as to his rights and liabilities, the inference is that his position is the same as that of the other partners. If they are bound by existing articles he will be bound by the same articles, if his conduct justifies the conclusion that he has assented to them, and if any special agreement is made with him, it will be regarded as incorporated with any previous agreement between the older partners, although of course so far as the two may be inconsistent, the latest will prevail.[2] If, indeed, the incoming partner has no knowledge of any prior agreement between the others, he cannot be bound thereby,[3] for nothing that he can have done can, under these circumstances, be regarded as evidence of any assent thereto on his part, and it is upon such presumed assent that the rule is founded."

Must not be joined as party, plaintiff or defendant, in suits relating to business of the old firm.

SEC. 529. As ar incoming partner is not a party to any contract or other obligation created by the firm before he became connected with it, it follows as a matter of course that at common law he can neither sue nor be sued thereon.[4] But this does not apply to bills or notes or other obligations that pass by delivery,[5] but as to all other obligations the rule is inflexible, even though by agreement the new firm assumes the obligations of the old.[6] This rule has been changed by statute in many States, and in determining the question in a given case, reference should be had to the statute, if there be one.

---

[1] Ponton v. Dunn, 1 R. & M. 402: E. C. L. R. 21.

[2] See Austen v. Boys, 24 Beav. 598, and 3 DeG. & J. 626.

[3] Id.

[4] Milford v. Ward, 1 Esp. 182; Ord v. Portlat, 3 Camp. 239, n.; Vine v. Ashby, 10 B. & C. 288; Young v. Hunter, 4 Taunt. 582.

[5] Ord v. Portlat, *ante*.

[6] Witsford v. Wood, 1 Esp. 182; Radenhurst v. Bates, 3 Bing. 463.

Evidence of assumed obligation to pay.

SEC. 530. Unquestionably, however, peculiar circumstances may produce exceptions to the general rule, and it has been held that payment of interest of the old debts,[1] length of standing in the firm, knowledge of the state of the books, accompanied with benefit derived from the contracts on which they are founded, will be evidence from which a jury may infer the assent of the incoming partner to debts previously contracted by the firm. The general rule, as well as the exceptions to it which may possibly occur, are well illustrated by the case of Ex parte Peele.[2] There, Kirk, a warehouseman carrying on business under the firm of Kirk & Company, being indebted to Sir Robert Peele for goods sold, after that debt was contracted, had entered into a treaty with Ford, a breeches maker, for forming a partnership. About four months afterward a commission of bankrupt issued against them. No articles having been executed, Ford disputed the point of partnership, which was tried at law, and the partnership was established upon the evidence of acts done. A petition was presented by Sir Robert Peele to prove his debt as a joint debt. In support of the petition, the affidavit of one Copeland stated that it was agreed that the separate debts of Kirk should be assumed by the partnership, that entries were made in the books with the knowledge of Ford, and, particularly, that the goods furnished by the petitioner were entered at a reduced price. This was opposed by the affidavit of Ford, denying the agreement, or even knowledge of these circumstances. Lord Eldon: "I agree it is settled that if a man gives a partnership engagement in the partnership name, with regard to a transaction not in its nature a partnership transaction, he who seeks the benefit of that engagement must be able to say, that, though in its nature not a partnership transaction, yet there was some authority beyond the mere circumstance of partnership to enter into that contract, so as to bind the partnership, and then it depends upon the degree of evidence. Slight circumstances might be sufficient, where in the original transaction the party to be bound was not a partner, but at the subsequent time had acquired all the benefit, as if he had been a partner in the original transaction; and it would not be unwholesome for a jury to infer largely that that obligation, clearly according to conscience, had been given upon an implied authority. So here, if this was a case in which it was found

[1] Ex parte Jackson, 1 Ves. Jr. 131; Kirwan v. Kirwan, 2 Comp. & M. 617.

[2] 6 Ves. 602; 1 Hov. Supp. 631. Saville v. Robertson, 4 T. R. 720.

upon the trial that this man was a partner upon a long existing partnership, with a regular series of transactions, books, etc., a knowledge of what his partner had been doing might be inferred against him; that which in common prudence he ought to have known. But that is not the case of this partnership: it was a treaty. It is not even yet agreed how the stock and partnership were to be formed. In the course of that treaty, Ford, ignorant of law, permits acts to be done, which the law holds to be partnership acts. It is a very different consideration, whether this man, so trepanned into a partnership, had got regular books, etc.; and it is difficult to say, not only, that knowing this he had agreed to it, but that he knew it, in which case I am afraid he must be bound. That fact has not been sufficiently inquired into." The order, therefore, directed a reference to the commissioners to inquire whether, at the commencement of the partnership, any debts due from Kirk on account of his stock in trade were assumed, and any debts due to him carried into the partnership, with the knowledge and assent of Ford

Rule in Helsby v. Mears.

SEC. 531. In a modern case of coach proprietorship,[1] the responsibility of incoming partners for the previous contracts of the firm was carried to a considerable extent. Mrs. Tomlinson, the proprietor of the Liverpool and Chester mail, agreed to convey watch cases for Walker, the assay-master at Chester, at the ordinary charge for parcels. Upon the loss of some of the watch cases, an action of *assumpsit* was brought against Mrs. T. and her partner Salisbury. It appeared that Salisbury did not become a partner until after the agreement, and after *the last annual settlement* of accounts between Walker and Mrs. T. Bayley, J., in delivering the judgment of the Court of King's Bench, said that the contract was binding on all who were partners at the time, and all who might afterward become so, until some notice of an intention to rescind the contract was given to Walker.

Must be novatio debiti — Vere v. Ashby.

SEC. 532. It may be observed, upon the case just cited, that a different decision might have led to consequences highly injurious to the public. With respect also to Lord Eldon's order in Ex parte Peele, its equity is not to be doubted. But it seems clear that in all cases of this nature the primary consideration for the jury is, between what parties was the contract *actually* made? If, indeed, it be clear

[1] Helsby v. Mears, 5 . & C. 504.

from the evidence, that upon the accession of a partner to the house, a new promise was made by the entire new firm in respect of the old debt, in such case there is a deliberate *novatio debiti*, and the new partner must be charged under the contract. But, if no such new promise be proved; if, for instance, the incoming partner was a dormant partner, and joined in no act to ratify the contract, he will not be concluded by it, for neither was he a party to it originally, nor does the *mere* act of joining the partnership amount to a ratification. In the case of Vere v. Ashby,[1] it was agreed that Shaw should be a dormant partner in the firm of Ashby & Rowland, as from the 18th of May preceding the agreement. Accordingly Shaw became a partner, but his partnership was unknown to the world until after the dissolution of the firm. During the interval between the 18th of May and the date of the agreement Rowland indorsed a bill of exchange in the partnership name of Ashby & Rowland, to the bankers of the firm, who discounted it. It was held that Shaw was not liable on this bill, he not having been an actual partner at the time when it was discounted. In this case it was observed by Parke, J., that the rule as to ratification applies only to the acts of one who professes to act as the agent of a person who afterward ratifies. Rowland, at the time when the first bill was discounted, did not profess to act as the agent of Shaw. The retrospective date of the partnership might affect the accounts between partners, but not the rights of third persons.

What amounts to a novation.

SEC. 533. But if after the accession of a partner a bill be accepted by the new firm in respect of a contract made by the old firm, that is a ratification of the contract by the new firm, and every member of the new firm, whether dormant or ostensible, will be bound, for the party who actually accepts the bill professes to act as the agent of all the partners both dormant and ostensible.[2]

The principles which we have just been discussing will be applicable to circumstances unconnected with the general routine of trade. Thus, when a person enters into partnership with another who is tenant under a lease, this gives the landlord no right of suing the firm. But it will be otherwise where there is a new promise by the firm. Therefore where the lessee of a house and a person, who became his

[1] 10 B. & C. 288; Lloyd & Welsby, 20; and consider Saville v. Robertson, 4 T. R. 720.

[2] See and consider Lloyd v. Ashby, 2 Car. & Payne, 138; 2 Barn. & Adolph. 23.

partner after the commencement of the lease, jointly agreed by parol with the lessor, that if he would erect an additional story over the house, they would pay him during the residue of the term, besides the former rent, 10*l.* per cent, it was held that the landlord might maintain a joint action of assumpsit against the partners on this collateral agreement.[1]

When incoming partners not liable.

SEC. 534. In adventures, an incoming partner is not liable for the price of the goods. In the case of Young v. Hunter,[2] it appeared that the defendants, Hunter & Co., had purchased goods of the plaintiffs, which they intended to ship for the Baltic, and that the defendants, Hoffman & Co., who were not otherwise partners with Hunter & Co., were afterward allowed to join in the adventure, and to have a fifth share upon the goods being put on board. The plaintiffs knew nothing of Hoffman & Co., but sold the goods to Hunter & Co. only. The Court of Common Pleas held that Hoffman & Co. were not liable as dormant partners for the price of the goods, and refused to grant the plaintiffs a new trial. "Supposing it to be shown," said Heath, J., "that at one period of the transaction there was a partnership subsisting, it is not therefore to be inferred that there was a partnership in the particular original purchase." And Gibbs, J., observed as follows: "The only possible ground for a new trial would be, if the plaintiffs could show that at the time of the purchase of the goods from the plaintiffs, Hoffman & Co. and Hunter & Co. were concerned in that purchase on their joint account;[3] now, the only evidence given of it was, that at the time of the shipment they were so interested. How long before the shipment the purchase was made does not appear, but it is not to be inferred from Hoffman & Co. being interested at the time of the shipment that they were interested at the time of the purchase,[4] it is for the plaintiffs who seek to implicate them to make it out by evidence."

When an infant partner may become liable.

SEC. 535. An infant partner coming of age, and not disaffirming the partnership, may be considered in the light of an incoming partner as far as regards the future contracts of the firm. To avoid these, he must, as soon as he comes of age, give notice of his disaffirmance

[1] Hobey v. Roebuck, 2 Marsh. 434; 7 Taunt. 157.
[2] 4 Taunt. 582.
[3] See Gouthwaite v. Duckworth.
[4] See Saville v. Robertson.

to the creditors of the firm. This was held in the case of Goode v. Harrison.[1] In April, 1818, Bennion, an infant, held himself out to the world as a partner with one Goode, particularly by joining with the latter in ordering goods of Harrison, on the credit of Goode & Bennion jointly. After this purchase it did not appear that Bennion intended to continue a regular partnership with Goode, nor that he interfered with Goode's general business. Afterward, and after Bennion came of age, Goode ordered more goods of Harrison, and accepted a bill for such goods in the joint names of himself and Bennion. No step had been taken by Bennion to apprise Harrison that he had ceased to be a partner with Goode. In an action brought by Harrison against Good & Bennion, to recover the amount of the bill, it was held that Bennion was liable. At the trial, Bayley, J., stated his opinion to the jury to be that a fraud had been committed by Goode, and that where one of two innocent parties was to suffer, he ought to do so whose negligence occasioned the loss. That an infant may in point of fact be a partner, and sue as a partner on a contract, though he is not liable to the partnership creditors. That in April, 1818, Bennion held himself out as a partner with Goode, and to Harrison in particular, and that after he came of age, in May, 1818, he should have given notice of his dissent from the partnership, or that he would be no longer liable as a partner, which he might easily have done. That he knew he would be supposed by Harrison still to continue a partner, and that he was negligent in not putting a stop to that delusion. That if an infant, shortly before he comes of age, represent himself as a partner, he ought to take care to notify that he is not so when he comes of age, as he facilitates the commission of a fraud. That though the payment, after the infant came of age, was not sufficient to confirm the partnership, yet as there was in this case an actual partnership between Goode and Bennion, and inasmuch as Bennion might have prevented Harrison from being deceived if he had given notice of his dissent to the partnership, or that he would be no longer liable as a partner, he ought to be liable to Harrison, and that, in effect, by his omission to do so, he suffered Goode to pledge his, Bennion's, credit to Harrison after he came of age. The jury accordingly gave their verdict for Harrison. A bill of exceptions was then taken to the learned judge's direction, but the Court

[1] 5 Barn. & Ald. 150. The infant partner on coming of age may confirm the partnership contract, in which case he would subject himself to the liabilities of the firm incurred before coming of age. And such confirmation may be express or implied. Miller v. Sims, 2 Hill (S. C.), 479.

of King's Bench were unanimously of opinion that the direction was right.

But, though such is the situation of an infant partner in regard to the *future* contracts of the firm, we may remark that he is much more secure against liability for *past* contracts. In the first place, he will not be *chargeable in an action* in respect of past contracts, unless his promise to pay, or his ratification of a debt contracted during infancy, be made in writing.[1] And secondly he may *maintain an action* to recover money paid by him on a contract entered into during his infancy, provided he has received no benefit from the contract during that time,[2] and *a fortiori* he may maintain such action against a party who holds the money as a penalty for the non-performance of the contract by the infant.[3] If, on the other hand, he have received substantial benefit from the contract, it seems that he cannot, on attaining twenty-one, maintain an act for the recovery of money paid by himself personally, as the consideration for the contract.[4]

The requirements of the English statute has no application in this country. But as we have seen, there may be an express or implied ratification by the infant after coming of age.[5]

On the subject of an infant's liability Mr. Lindley observes: "In equity, an infant who is guilty of fraud is not so free from liability as he is at law,[6] and although, as a rule, an infant cannot be made bankrupt,[7] yet if he fraudulently represents himself as of age, and obtains credit by his false representations, and is made bankrupt, the adjudication against him will not be superseded, and his deceived creditors will be paid out of his estate.[8]

Moreover, notwithstanding the general irresponsibility of an infant, he cannot, as against his copartners, insist that in taking the partnership accounts he shall be credited with profits, and not be debited with losses. He must either repudiate or abide by the agreement

[1] By the 5th section of Lord Tenterden's act, the 9th Geo. 4, c. 14, it is enacted, "That no action shall be maintained, whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing, signed by the party to be charged therewith."

[2] Corpe v. Overton, 10 Bing. 252.

[3] Ibid.

[4] Holmes v. Blogg, Taunt. 508.

[5] See, also, Thompson v. Lay, 4 Pick. 48; Peirce v. Toby, 5 Met. 168; Dana v. Stearn, 3 Cush. 372; Hale v. Gerish, 8 N H. 374; Benham v. Bishop, 9 Conn. 330; Merriam v. Wilkins, 6 N. H. 432; Lawson v. Lovejoy, 8 Greenl. 405.

[6] See Wright v. Snowe, 2 De G. & S. 321.

[7] Ex parte Henderson, 4 Ves. 163; Ex parte Lees, 1 Deac. 705; Belton v. Hodges. 9 Bing. 365.

[8] See Ex parte Watson, 16 Ves. 265; Ex parte Bates, 2 M. D. & D. 337; Ex parte Unity Banking Association, 4 Jur. (N. S.) 1257, now reported in 3 De G. & J. 63.

under which alone he is entitled to any share of the profits. So an infant cannot hold shares, and decline to pay the calls payable in respect of them. He may, if he chooses, repudiate the shares, and so get rid of his liabilities;[1] but if he does not repudiate the shares, he must pay calls like any other shareholder.[2] *Qui sentit commodum sentire debet et onus.*

He may avoid the contract into which he has entered, either before or within a reasonable time after he has come of age.[3] If he avoids the contract, and has derived no benefit from it, he is entitled to recover back any money paid by him in part performance of it;[4] but he cannot do this if he has already obtained advantages under the contract, and cannot restore the party contracting with him to the same position as if no contract had been entered into.[5]

If, when he comes of age, he is desirous of retiring from the firm, he should express his determination speedily and unequivocally. It is true that by Lord Tenterden's Act[6] it is enacted that "no action shall be maintained whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing, signed by the party to be charged therewith;" but this enactment only protects a person come of age from the consequences of acts done by him during his minority. It does not say that a contract entered into before and persisted in after the attainment of majority shall not be binding, as from that time. Nor, it is conceived, could the act be construed so as to have any such effect. Therefore, if an infant shareholder, after he comes of age, permits his name to continue registered, he thereby ratifies the agreement by which he originally became a shareholder.[7]

Moreover, the doctrine of holding out is itself sufficient to impose

---

[1] Newry and Enniskillen Rail. Co. v. Coombe, 5 Ex. 565. The repudiation must be either before or within a reasonable time after majority. Dublin and Wicklow Rail. Co. v. Black, 8 Ex. 181. If a company is being wound up and is insolvent, of course it will be for the benefit of an infant shareholder to repudiate his shares, and so avoid being made a contributory. See Reid's case, 24 Beav. 318.

[2] See Cork and Bandon Rail. Co. v. Cazenove, 10 Q. B. 935; Leeds and Thirsk Rail. Co. v. Fearnley, 4 Ex. 26; North West. Railr. Co. v. McMichael, 5 Ex. 114. The Birkenhead, Lancashire, etc., Rail. Co. v. Pilcher, 5 Ex. 24, is not opposed to these; see S. C., id. 121.

[3] Co. Litt. 380, b. Newry and Enniskillen Rail. Co. v. Coombe, 8 Ex. 565; Dublin and Wicklow Rail. Co. v. Black, 8 Ex. 181.

[4] Corpe v. Overton, 10 Bing. 253.

[5] Holmes v. Blogg, 8 Taunt. 508; Ex parte Taylor, 2 Jur. (N. S.) 220.

[6] 9 Geo. 4, c. 14, § 5.

[7] See Cork and Bandon Railway v. Cazenove, 10 Q. B. 935.

liability upon an adult, although he may not long have attained his majority. This is well exemplified in Goode v. Harrison.[1] There an infant was a member of a firm, and he was known to be such. After he had attained twenty-one he did not expressly either affirm or disaffirm the partnership. He was held liable for debts incurred by his copartners subsequently to that time. If an infant, shortly before he comes of age, represents himself as a partner, he ought to take care to notify that he is not so when he comes of age.

[1] 5 B. & Ald. 147.

CHAPTER XXIV.

RETIRING PARTNERS.

SEC. 536. Liabilities of retiring partners.
SEC. 537. Rule as to original creditors.
SEC. 538. Permitting name to be used after retirement.
SEC. 539. Rule as to dormant partners.
SEC. 540. Liability for special contracts.
SEC. 541. Not generally bound by new contracts. Pindar v. Wilks.
SEC. 542. Not bound by instruments negotiated after dissolution. Abel v. Sutton.
SEC. 543. Rule in Kilgour v. Finlyson.
SEC. 544. May give power to remaining partners to indorse in name of old firm.
SEC. 545. Acceptances in name of old firm, not binding.
SEC. 546. Wrightson v. Pullan; Usher v. Dauncey.
SEC. 547. Effect of dissolution upon interest of partners in the firm property.
SEC. 548. How he may be discharged from contract. Clayton's case.
SEC. 549. Rule in Brooke v. Enderby.
SEC. 550. In case of a continuance of new partnership. Newmarch v. Clay.
SEC. 551. Money of new partnership applicable only to debts of new firm. Thompson v. Brown.
SEC. 552. Appropriation of payments by the payee. Simpson v. Ingham.
SEC. 553. Contract of remaining partners to pay old debts, effect of.
SEC. 554. When creditors accept the remaining partners. Bedford v. Deakin.
SEC. 555. When bill or note is indorsed with reservation of all rights. Featherstone v. Hunt.
SEC. 556. Where the creditors accept new security. Evans v. Drummond.
SEC. 557. Rule in Reid v. White.
SEC. 558. Taking sole security of new firm no written security previously existing. Thompson v. Drummond.
SEC. 559. Ex parte Whitmore.
SEC. 560. Rule when creditors agree that retiring partner shall be simply surety for old firm. Oakley v. Parsheller.
SEC. 561. Where the creditors receive interest of the new firm. Gough v. Davies.
SEC. 562. When the creditor continues trading with the new firm. David v. Ellice.
SEC. 563. Lodge v. Dicas.
SEC. 564. Lodge v. Dicas and David v. Ellice, overruled by Thompson v. Percival, Kirwan v. Kirwan, and Hart v. Alexander.

SEC. 565. Thompson v. Percival.
SEC. 566. Kirwan v. Kirwan.
SEC. 567. Hart v. Alexander.
SEC. 568. Money borrowed of a trustee who is a partner. Dickinson v. Lockyer.
SEC. 569. Retirement of a partner with knowledge of firm's insolvency. Parker v. Ramsbottom.
SEC. 570. When the purpose is to defraud the creditors. Anderson v. Maltby.
SEC. 571. Termination of liability in ordinary partnerships.
SEC. 572. Termination of liability as to future acts.
SEC. 573. Effect of bankruptcy on powers of partners.
SEC. 574. Retirement of dormant partner.
SEC. 575. Rule in Heath v. Sansom.
SEC. 576. Dissolution and notice, effect of.
SEC. 577. When notice is not given.
SEC. 578. Effect of notice of dissolution.
SEC. 579. Instances where notice does not protect from liability.
SEC. 580. Rights of partners after dissolution. Lyons v. Haynes, Butchart v. Dresser, Ault v. Goodrich.
SEC. 581. What amounts to notice of dissolution.
SEC. 582. Termination of liability as to past acts.
SEC. 583. Payment.
SEC. 584. Rule in Clayton's case.
SEC. 585. Rule in Sterndale v. Hawkinson.
SEC. 586. Rule in Brooke v. Enderbey.
SEC. 587 Rule in Newmarch v. Clay.
SEC. 588. Application of the rules adopted in the preceding cases.
SEC. 589. Illustration. Beale v. Caddick.
SEC. 590. Simpson v. Ingham.
SEC 591. Partner may bind firm by assenting to transfer of debts due from or to it.
SEC. 592. Illustration. Wickham v. Wickham.
SEC. 593. Application of payments.
SEC. 594. Release.
SEC. 595 Rule in Solly v. Forbes; Price v. Baker; Hartley v. Manton.
SEC. 596. Substitution of debtors and securities by agreement.
SEC. 597. Agreement of creditors to look to remaining partners, is valid.
SEC. 598. Cases in which a retiring partner has not been discharged, no new partner having been brought into the firm.
SEC. 599. Cases in which a retiring partner has not been discharged, although a new partner has been brought into the firm.
SEC. 600. Cases in which a retiring partner has been held discharged.
SEC. 601. Of the doctrine of merger.

Of the liabilities of retiring partners.

SEC. 536. When an ostensible partner retires from the firm he must give notice of his retirement, otherwise he will be liable to the credi-

itors of the continuing firm for contracts entered into by them subsequently to his retirement.[1]

The effect of a proper legal notice of a partner's retirement is, to exonerate him from liability for the future, though not for the past.[2] It is clear, therefore, that after a retirement properly notified, no new contract by the continuing firm can bind the partner who retires, and hence, after the retirement of one or more partners, the remaining partner cannot put the partnership name to negotiable securities so as to bind the old firm.

To those who have had no dealings with the original firm, notice of the dissolution of a partnership inserted in the Gazette is equivalent to actual notice. Therefore, where the plaintiff Godfrey,[3] who

[1] Parkin v. Carruthers, 3 Esp. 248; Stables v. Eley, 1 Car. & Payne, 614; Graham v. Hope, 1 Peake, 154. On the subject of notice of the dissolution of a partnership, Mr. Lindley observes: "Notice of death is not requisite to prevent liability from attaching to the estate of a deceased partner, in respect of what may be done by his copartners after his decease. Devaynes v. Noble, Houlton's case, 1 Mer. 616; Johnes' case, id. 619; Brice's case, id. 620; Webster v. Webster, 3 Swanst. 490; see Vulliamy v. Noble, 3 Mer. 614; Brown v. Gordon, 16 Beav. 302, as to the power of the surviving partners who are the executors of the deceased partner, to bind his estate. For by the law of England, the authority of an agent is determined by the death of his principal, whether the fact of death is known or not. See Blades v. Free, 9 B. & C. 167; Smout v. Ibery, 10 M. & W. 1; Campanari v. Woodburn, 15 C. B. 400. The death of one partner does not, however, determine an authority given by the firm through him before his death; and consequently, if after his death such an authority is acted on, the surviving partners will be liable for it. In Usher v. Dauncey, 4 Camp. 97, bills were drawn and indorsed in blank by a partner in the name of the firm, and were given by him to a clerk to be filled up and negotiated as occasion might require. The partner in question died, and after his death, and after the name of the firm had been altered, one of the bills was filled up and negotiated. Lord Ellenborough held that the bill was binding on the surviving partners, considering that the power to fill up the bill emanated from the partnership and not from the individual partner who had died. Moreover, it does not follow that because a creditor has no remedy against the estate of a deceased partner in respect of debts contracted by his copartners since his death, his estate is not liable to contribute to such debts at the suit of the surviving partners. That is a different matter altogether, and depends on the agreement into which he entered with his copartners, as will be seen hereafter when the subject of winding up is under consideration. For instances where the estate of a deceased partner has been held liable to contribute to debts incurred since his decease, see Blakesley's Executor's case, 3 Mc. & G. 726; Hamer's Devisee's case, 2 De G. M. & G. 366. When a firm becomes bankrupt, the authority of each member to act for the firm at once determines. If one partner only becomes bankrupt his authority is at an end, and his estate cannot be made liable for the subsequent acts of his solvent copartners. At the same time, if notwithstanding the bankruptcy of one partner the others hold themselves out as still in partnership with him, they will be liable for his acts, as if he and they were partners; see Lacy v. Wolcott, 2 Dowl. & Ry. 458; and although the estate of a bankrupt partner does not incur liability for the acts of the other partners done since the bankruptcy, yet the solvent partners have power to bring the partnership transac-

[2] Wood v. Braddick, 1 Taunt. 104; Ault v. Goodrich, 4 Russ. 430.

[3] Godfrey v. Turnbull, 1 Esp. 371. See Wrightson v. Pullan, 1 Stark. 375; 2 Chit. 121.

had not previously dealt with the firm, took a partnership bill, which had been made in the partnership name after the retirement of a partner so notified, Lord Kenyon said to the jury: "If the dissolu-

tions to an end, and to dispose of the partnership property. This subject will be examined hereafter in the chapter on Bankruptcy, to which the reader is therefore referred. See Fox v. Hanbury, Cowp. 445; Morgan v. Marquis, 9 Ex. 145. Another exception, but one which only proves the rule, is that if a dormant partner (*i. e.*, one not known to be a partner), known to a few persons to be a partner, is not dormant as to them; see Farrar v. Deflime, 1 Car. & K. 580; Carter v. Whalley, 1 B. & Ad. 14; Evans v. Drummond, 4 Esp. 89, retires, the authority of his late partners to bind him ceases on his retirement, although no notice of it be given. But this is because he never was known to be a partner at all, and the reason for the general rule has therefore no application in his case. The following decisions illustrate this exception: In Carter v. Whalley, 1 B. & Ad. 11, the defendant Saunders was a partner in the "*Plas Madoc Colliery Co.*," but there was nothing to show that the plaintiff or the public ever knew that such was the case. Saunders withdrew from the company, but no notice of his withdrawal was given either to the plaintiff or to the public. After his withdrawal, the company became indebted to the plaintiff, and it was held that Saunders was not liable for the debt, upon the ground that the name of the company gave no information as to the parties composing it, and Saunders himself was not known either to the plaintiff or to the public to have belonged to the company before he withdrew. In Heath v. Sansom, 4 B. & Ad. 172, the defendants Sansom and Evans carried on business as partners under the style of Phillip Saunders & Co., but Evans was not known to be a partner. They dissolved partnership by mutual agreement, but did not notify the fact. After the dissolution, Sansom gave the plaintiff a promissory note on which he sued Sansom & Evans. The court decided that Evans was not liable, for when his right to share profits ceased, he could not be held responsible for the subsequent acts of his copartner, unless he authorized those acts or held himself out as still connected with him, and he had done neither. See, too, Evans v. Drummond, 4 Esp. 89. This doctrine seems not to apply to Scotland, see Hay v. Mair, 3 Ross' L. C. on Common Law, 639. The recent case of The Western Bank of Scotland v. Needell, 1 Fos. & Fin. 461, seems at first sight opposed to the authorities in the text, but it is conceived that in that case there must have been evidence to show that the defendant was known to have been a partner to the plaintiffs before he retired. With the three exceptions which have been noticed, the general proposition above stated holds good. Thus, if a partner becomes lunatic, and his lunacy is not apparent or made known, his power to bind the firm and his liability for the acts of his copartners, see Molton v. Camroux, 2 Ex. 487, and 4 id. 17, and Baxter v. The Earl of Portsmouth, 5 B. & C. 170, and the cases cited, to show that the lunacy of one partner does not dissolve the firm, will remain unaffected. So, if a partnership is dissolved, or one of the known members retires from the firm, until the dissolution or retirement is duly notified, the power of each to bind the rest remains in full force, although as between the partners themselves a dissolution or a retirement is a revocation of the authority of each to act for the others. See Mulford v. Griffin, 1 Fos. & Fin. 145; Faldo v. Griffin, id. 147, and the next cases. Thus, if a known partner retires and no notice is given, he will be liable to be sued in respect of a promissory note made since his retirement by his late partner, even though the plaintiff had no dealings with the firm before the making of the note. See Parkin v. Carruthers, 3 Esp. 248; Williams v. Keats, 2 Stark. 290, E. C. L. R. 3; Brown v. Leonard, 2 Chitty, 120; Dolman v. Orchard, 2 C. & P. 104, in which three last cases, however, there was a continual holding out. See as to ordering such a bill to be delivered up, Ryan v. Mackmath, 3 Bro. C. C. 15. And in determining which was first in point of time, viz., notice of dissolution or the making of the note, effect must be given to the presumption that the instrument was made and issued on the day it bore date, unless some reason to the contrary can be shown See Anderson v. Weston, 6 Bing. N. C. 296. In a modern case a firm was dissolved on the 29th of Dec.,

tion be notified in the ordinary and usual way, as it is the only mode by which the fact of the dissolution can be promulgated to the world, at least to those who have had no previous dealing with

1837, and a bill dated the 2d of February, 1838, was drawn and indorsed by one partner in the name of the late firm, but when he indorsed it did not exactly appear. Notice of dissolution was given by advertisement in the "Gazette," on the 20th March, 1838. It was held that in the absence of evidence to the contrary, the bill must be taken to have been drawn on the day it bore date, and that the time of its indorsement was a matter to be inferred by the jury from all the circumstances of the case. The jury found that it was indorsed before the 20th March, 1838, and the holder of the bill was consequently held entitled to a verdict against all the members of the dissolved firm. See Anderson v. Weston, 6 Bing. N. C. 296. So a partner who retires and does not give sufficient notice is liable to be sued for torts committed subsequently to his retirement by his late copartners or their agents. Stables v. Eley, 1 Car. & P. 614. Moreover, if a dormant partner is known to certain individuals to have been a partner, he is as to them no longer in the situation of a dormant partner, and must therefore give them notice of his retirement if he would free himself from liability in respect of the future transactions between them and his late partners. Farrar v. Deflime, 1 Car. & K. 580. See, too, Evans v. Drummond, 4 Esp. 89, and Carter v. Whalley, 1 B. & Ad. 14. It is obvious, therefore, that on the dissolution of a firm or the retirement of a partner, it is of the greatest importance to notify the fact, and each partner has a right to notify it. If his copartners prevent him from exercising that right, a court of equity will, if possible, aid him and compel them to do what may be necessary to enable notice to be given. In Troughton v. Hunter, 18 Beav. 470, a partnership was dissolved by a decree of the court. It appeared that no advertisement of the dissolution would be inserted in the "Gazette" unless signed by both partners. The defendant, who, it seems, would not sign the advertisement, was ordered so to do by the court.

Effect of notice of dissolution.—Subject to two exceptions, which will be examined hereafter, notice of dissolution of a firm or the retirement of a partner duly given, determines the power previously possessed by each partner to bind the others. Hence, after the dissolution of a firm or the retirement of a member and notification of the fact, no member of the previously existing firm is, by virtue of his connection therewith, liable for goods supplied to any of his late partners subsequently to the notification, Minnitt v. Whinery, 5 Bro. P. C. 489; nor is he liable on bills or notes subsequently drawn, accepted, or indorsed by any of them in the name of the late firm, Paterson v. Zachariah, 1 Stark. 375; Abel v. Sutton, 3 Esp. 108; Spenceley v. Greenwood, 1 Fos. & Fin. 297, even although they may have been dated before the dissolution, Wrightson v. Pullan, 1 Stark. 375; S. C. Wright v. Pulham, 2 Chitty, 121; or have been given for a debt previously owing from the firm, Kilgour v. Finlyson, 1 H. Blacks. 156; Dolman v. Orchard, 2 Car. & P. 104, by the partner expressly authorized to get in and discharge its debts. Kilgour v. Finlyson, 1 H. Blacks. 156. See Lewis v. Reilly, 1 Q. B. 349. There are, it is true, cases to be met with in which, notwithstanding a dissolution and notice, a bill or note in the name of the firm has been held to bind those who were members thereof prior to the dissolution; but in each of these cases there was some circumstance taking it out of the ordinary rule. In Burton v. Issitt, 5 B. & Ald. 267, the continuing partner had authority to use the name of the retired partner in the prosecution of all suits for the recovery of partnership property. This was held to authorize the giving of a promissory note for sixpences, payable under the Lords' Act, and the retired partner was therefore held bound by a note given by his late partner in payment of those sixpences. In Smith v. Winter, 4 M. & W. 454, the continuing partner had express permission to use the name of his late partner, who was therefore justly held liable on a bill given in the name of the old firm after his retirement. The only case, indeed, of this description which presents any difficulty is, Lewis v. Reilly, 1 Q. B. 349. There two partners drew a bill payable to their own order, and afterward dissolved partnership. One of them then indorsed the bill

the partners, it seems sufficient at least to be left to the jury from thence to infer notice. In the present instance there is no proof of any actual notice to Godfrey, the plaintiff, but the publication in the

---

in the name of both to the plaintiff, who knew of the dissolution. It was held, in an action by him against both partners, that he was entitled to recover on the bill, and that it was immaterial whether he knew of the dissolution or not. The precise ground of this decision does not distinctly appear. The court seems to have proceeded on the supposition that an indorsement by one of several payees in the name of all is sufficient, but the writer has been unable to find any previous authority for such a doctrine, save where the indorsers are partners, which in the case in question they were not, as the plaintiff was found by the jury to have known. The case is certainly anomalous and requires reconsideration. See Story on Bills, § 197, and Abel v. Sutton, 3 Esp. 108. The exceptions alluded to above as qualifying the rule that the agency of each partner is determined by dissolution (or retirement) and notice are:—

First, where a partner who has retired and notified his retirement, nevertheless continues to hold himself out as a partner; and, secondly, where what is done only carries out what was begun before.

1. If a partner retires and gives notice of his retirement, and he nevertheless allows his name to be used as if he were still a partner, he will continue to incur liability on the principle of holding out explained in the early part of this treatise. In Williams v. Keats, 2 Stark. 290, E. C. L. R. 3. See, too, Dolman v. Orchard, 2 Car. & P. 104; Emmet v. Bradley, 7 Taunt. 600, after a partner has retired, and after notice thereof had been given by advertisement, a bill was accepted by his copartner in the names of himself and late partner. The names of both still remained painted up over their late place of business, and Lord Ellenborough held that the partner who had retired was liable on this bill notwithstanding the advertisement, for there was no evidence to show that the plaintiff in fact knew of the dissolution. See, as to this, Brown v. Leonard, 2 Chitty, 120. Upon this, however, it is to be observed that the only evidence that the retired partner authorized the continued use of his name, was the fact that he had not prevented it. Now, authorities are not wanting to show that if a partner retires, and notice of his retirement is given by advertisement, he will not continue to incur liability by the acts of his copartners simply because they continue to carry on business in the old name, and he does not take steps to stop them. See Newsome v. Coles, 2 Camp. 617. His forbearance in this respect does not necessarily amount to an authority to use his name as before, and unless his name is used by his authority, he is not liable on the ground that he holds himself out as a partner. As to a retiring partner's right to an injunction to restrain the continuing partners from carrying on business in the old name, see De Tastet v. Bordenave, Jac. 516; Webster v. Webster, 3 Swanst. 490, note; Lewis v. Langdon, 7 Sim. 421. But although it may be doubtful whether in Williams v. Keats there was a sufficient holding out, it is clear that if a partner retires and does still hold himself out as a partner, this is in fact signifying that he is willing to incur the responsibilities of a partner for the sake of those with whom his name is associated, and, therefore, he will continue to be answerable for their conduct, even to persons dealing with them with knowledge of his retirement. This was decided in Brown v. Leonard, 2 Chitty, 120, a case in which the plaintiff sued on a promissory note made in the name of Spring, Leonard & Bush. Before the note was made, Bush had retired from the firm, and the plaintiff, before he took the note, was told by Bush that he had ceased to be a partner with Leonard & Spring, but that his name was to continue for a certain time. Bush was held liable on the note, for, notwithstanding his retirement, his name was continued and with it his responsibility. The same principle was acted on in Stables v. Eley, 1 Car. & P. 614; E. C. L. R. 12, in which a retired partner whose name was still on a cart, and over the old place of business, was held liable for the negligence of the driver of the cart. The custom in England of giving notice in a particular paper of a dissolution of a partnership, which seems to be recognized in the English courts as conclusive so far as the rights of parties depends upon the question, has no force in this country. Actual notice is required here to all parties who

Gazette is proved, antecedent to his taking the note. The jury are to judge from the practice in the usual course and ordinary mode of business. Notices are to be found in every Gazette of the dissolution

have dealt with the firm, in order to exonerate a retiring partner from liability to subsequent creditors who in good faith have relied upon the obligations of the former firm, or at least knowledge of the fact or such circumstances as furnishes satisfactory evidence that they had knowledge of the fact, must be shown. Johnson v. Totten, 3 Cal. 321; Williams v. Bowers, 15 id. 321; Pope v. Brant, 18 Ill. 37; Ennis v. Williams, 30 Ga. 691; Lowe v. Penny, 7 La. An. 356; Skannel v. Taylor, 12 id. 773; Reiley v. Smith, 16 id. 31; Zaller v. Janvrin, 47 N. H. 324; Vernon v. Manhattan Co., 17 Wend. (N. Y.) 524; Wardwell v. Haight, 2 Barb. (N. Y.) 549; Como v. Port Henry Iron Co., 12 id. 27; Felbricht v. Armstrong, 5 Rob. (N. Y.) 339; Williams v. Birch, 6 Bosw. (N. Y.) 299; Little v. Clark, 36 Penn. St. 114; White v. Murphy, 3 Rich. (S. C.) 369; Hutchison v. Hudson, 8 Humph. (Tenn.) 426; Kirkman v. Snodgrass, 8 Head (Tenn.), 370; Tudor v. White, 27 Tex. 584; Prentiss v. Sinclair, 5 Vt. 149. And the publication of the notice in a newspaper taken by the plaintiff is a fact from which the jury may infer actual notice, Treadwell v. Wells, 4 Cal. 260; Page v. Brant, 18 Ill. 37. And a party who takes a partnership note signed by the firm, who has knowledge that the partnership articles provide for its dissolution in case of the withdrawal of capital, is put upon inquiry as to whether such dissolution has taken place. Smith v. Vanderburg, 46 Ill. 34. No formal or precise announcement of the dissolution of a partnership, either by publication or otherwise, is necessary even to bind a dealer with the old firm, but knowledge of any fact, however acquired, sufficient to put an ordinarily prudent man upon inquiry, will charge him with notice of whatever other facts a reasonable investigation would have disclosed. And persons who have dealt with a partnership are affected with notice of a dissolution if a statement of the fact that the firm have dissolved has reached him in any way, even though informal and not signed by a member of the firm, as this was sufficient to put him on his guard. Young v. Tibbitts, 32 Wis. 79. But see Ranson v. Soyless, 49 Ga. 471. The burden of proving notice, as against a subsequent creditor who has dealt with the former firm, rests upon the retiring partner. Kenny v. Atwater, 77 Penn. St. 34; Carmichael v. Greer, 55 Ga. 116. And to charge a principal with notice of the dissolution of a mercantile partnership, on the ground that notice was given to his agent, it must appear that the agent was authorized to represent the principal in that particular. Stewart v. Sonneborn, 49 Ala. 178. See, also, as to the rights of a party dealing with the firm after a dissolution where no public notice has been given, Southern v. Grein, 67 Ill. 106. And in Ohio, even where there had been a publication of dissolution of the old firm and the formation of a new one, but the retiring partner was a man of means and sold out his interest to his son, and the firm continued the business in the name of the old firm, it was held that a creditor who had no notice of the change, and who trusted the firm on account of the pecuniary responsibility of the father, was entitled to hold him responsible for the credit given. Speer v. Bishop, 24 Ohio St. 598. In Ketcham v. Clark, 6 Johns. (N. Y.) 144, the court say: "In England the notice must be given in a particular newspaper, viz.: 'The London Gazette,' but we have no such usage or rule here. I think, however, we ought to go so far, at least, as to say that public notice must be given in a newspaper of the city or county where the partnership business was carried on, or in some other way public notice of the dissolution must be given. The reasonableness of it may perhaps become a question of fact in the particular case; but public notice in some reasonable and sufficient manner must be given, and that will conclude all persons who have had no previous dealings with the firm; or if actual knowledge of the dissolution is, without such notice, brought home to the person dealing with the firm, such knowledge may be sufficient to conclude him."

Notice to subsequent dealers. — The question as to what notice is required, if any, to subsequent dealers with the continuing firm, who have had no dealings with the old firm, has been frequently discussed. In some of the cases

of partnerships, which seems to point out that as the mode adopted by the world for notifications of this sort, and therefore every prudent man in business ought to consult them."

---

it has been held that the usage in giving notice of the dissolution in a newspaper would be good, in others that it might be inferred from all the circumstances, such as adequate means of knowledge of the fact; Amidown v. Osgood, 24 Vt. 278; Burgan v. Lyell, 2 Mich. 102; Johnson v. Totten, 3 Cal. 343, or the long lapse of time between the dissolution and the contracting of the debt. Prentice v. Sinclair, 5 Vt. 149; Martin v. Walton, 1 McCord, 16; Hart v. Alexander, 2 M. & W. 484; Young v. Tibbitts, 32 Wis. 79; see, also, Remsom v. Loyless, 49 Ga. 471. Mr. Story maintains that in such cases no notice is required. Story on Partnership, § 159 and note; Ayrault v. Chamberlain, 26 Barb. (N. Y.) 89; Warren v. Ball, 37 Ill. 76; Chamberlain v. Dow, 10 Mich. 319. But the question of notice to those who have dealt with the firm is one, as we have stated, of fact. Notice or knowledge must be shown in such cases to exonerate the retiring partner from liability to one who deals with the new firm in good faith, as the former firm. The fact of knowledge of the change may be shown by circumstances. But no particular means of knowledge can be held as a matter of law to be actual or constructive notice in such cases. Schorten v. Davis, 21 La. An. 173; Pitcher v. Barrows, 17 Pick. 361; Goddard v. Pratt, 16 id. 412; Southwick v. Allen, 11 Vt. 75; 3 Kent, 67; Grinan v. Baton Rouge Mills Co., 7 La. An. 638; Dedford v. Reynolds, 36 Penn. St. 325; Bank v. Mudgett, 45 Barb. 663; Merritt v. Pollys, 16 B. Mon. (Ky.) 353; Southwick v. McGovern, 28 Iowa, 538. What circumstances will warrant the finding that one dealing with the firm was not affected by notice. Newcomet v. Bretzman, 69 Penn. St. 785. And actual notice of the withdrawal of a member from a firm would exonerate him from subsequent liability for the firm debts to those who had formerly dealt with the firm, even though his name might be retained in the firm, but without his authority. Newsome v. Coles, 2 Camp. 617; Jenkins v. Blizard, 1 Stark. 418; 3 Kent, *supra*. And in such cases where the necessity of some notice has been recognized, it has generally been held in this country that it was sufficient to publish the fact of the dissolution in some newspaper of general circulation in the vicinity. Shurlds v. Tilson, 2 McLean (U. S.), 458; Watkins v. Bank, 4 Whart. (Penn.) 482; Lansing v. Gaine, 2 Johns. 300; Prentice v. Sinclair, 5 Vt. 149; Graves v. Merry, 6 Cow. (N.Y.) 701. And it has recently been held in the Supreme Court of the United States that a retiring partner who neglects to give such notice is liable for a debt subsequently contracted by the remaining members, to one who had never had any previous dealings with it, but who had previously been informed that the retiring member was a partner therein. Lovejoy v. Spofford, 93 U. S. 430; see, also, to same effect, Wardwell v. Haight, 2 Barb. (N. Y.) 549. But a distinction was recently made in Virginia between the sufficiency of the notice required to a former dealer and a subsequent one. Dickinson v. Dickinson & Co., 25 Gratt. (Va.) 321. And in Michigan it has been held that persons having no knowledge of a partnership are not entitled to notice of its dissolution. Chamberlain v. Dow, 10 Mich. 319. And the fact that a bank has discounted notes bearing the names of the partnership, does not constitute them dealers with it, so as to require actual notice of dissolution to exonerate a retiring partner. City Bank v. McChesney, 20 N. Y. 240; Same v. Dearborn, id. 244; but see Mechanics' Bank v. Livingston, 33 Barb. (N. Y.) 458. A general printed notice in the newspapers of a dissolution of a copartnership, is not sufficient to bind one who has had dealings therewith; such person is entitled to special notice. Even if special notice is given, accompanied with the notification that certain persons will carry on the business, and settle that of the late commercial firm, these persons will be considered as agents of the firm for the settlement of its indebtedness. Skannel v. Taylor, 12 La. An. 773. To affect the rights of one dealing with a partnership, actual notice of its dissolution must be brought home to him; and it is not sufficient that the firm took the necessary steps to give notice, if such notice was never received. The publication of the notice of dissolution in a newspaper taken by the plaintiffs, is a fact from which the jury may infer actual notice. Treadwell v. Wells, 4 Cal.

Rule as to original creditors.

SEC. 537. As to the original creditors of the firm, express notice of a partner's retirement must be conveyed to them,[1] though it is not material in what manner it is given. Where, on the trial of an action

260; Page v. Brant, 18 Ill. 37; Johnson v. Totten, 8 Cal. 343. And when such a newspaper is in evidence, it is no error to admit other papers in evidence not taken by them, by way of establishing the publicity of the notice and raising the presumption of actual knowledge on the part of the plaintiffs. Nor is it error to instruct a jury, that if sufficient time had elapsed between the dealings of the plaintiffs with the old firm, and their subsequent transactions with the new firm to put a reasonable man upon inquiry, they might be treated as new dealers. Treadwell v. Wells, 4 Cal. 260. In a recent case in Kentucky, Gaar v. Huggins, 12 Bush (Ky.), 259, it was held that a retiring partner who has given no notice of his retiracy from the firm, is not liable to one who deals with the firm for the first time after his withdrawal, unless he permits his name to be used in the transaction of the business, or so conducts himself in reference to firm transactions as to induce the belief in those dealing with it that he is still a member thereof. See, also, Kennedy v. Bohannon, 11 B. Monr. (Ky.) 119. In Shamburg v. Ruggles, 83 Penn. St. 148, a different rule was adopted, and a person who was a partner in a firm doing business under the name of the Citizens' Bank, who retired without notice in December, 1872, was held liable for a debt contracted by the firm in January, 1873, although the creditor, at the time when the debt arose, did not know that the retiring member had ever been a partner. But in this case it appeared that the defendant was, against his wishes, advertised as a director until June, 1873, but whether the plaintiff knew this fact or not does not appear.

[1] See Ex parte Burton, 1 G. & J. 207; Ex parte Leaf, 1 Desc. 176. To establish the liability as partners of defendants who have dissolved partnership, it must appear, 1st, that the plaintiff, at the time the contract was made under which his account accrued, knew that defendants had been in partnership; 2d, that he was ignorant of their dissolution; and 3d, that he made the contract supposing he was contracting with the defendants as partners, and in reliance upon their joint liability. Pratt v. Page, 32 Vt. 13. Thus the defendants had been partners previous to March, 1857, at which time they dissolved partnership and advertised the dissolution in a newspaper published in the town where they had done business. The business was continued by one of the partners, who, in the fall of 1857, bought coal of the plaintiffs which the latter sold with no knowledge of the dissolution, and on the credit of the partnership. The plaintiffs had sold coal in one instance to the defendants before the dissolution, which was the only dealing that they had had with them, but the defendants had been regular customers of a firm which sold coal at the same place, and to which the plaintiffs had succeeded, the former firm having consisted of one of the plaintiffs and one A, and the present firm of the same plaintiff and one B, who had for some years been a clerk of the former firm. It was held that the plaintiffs were to be regarded as having had "former dealings" with the defendants, and that they could be affected only by actual notice of the dissolution. It was also held that the lapse of time between the dissolution and the purchase of the coal — the fact that the plaintiffs were doing business in the same town with the defendants — and the fact that an advertisement of the plaintiffs stood next to the advertisement of the dissolution in the newspaper — although to be considered in determining whether the plaintiffs had actual notice, were of no avail in law against the fact that they had no actual knowledge of the dissolution. Lyon v. Johnson, 28 Conn. 1. Where a partnership is dissolved by the voluntary act of the partners, and not by operation of law, reasonable notice (as a general rule, by publication in a newspaper of the vicinity) must be given to the public, and until it is actually so given, the partners remain liable as such to any person, although not a former dealer with the firm, who may thereafter enter into a contract, within the scope of the partnership business, with either of the partners, in the name and upon the credit of the partnership, without actual knowledge of the dissolution. And it makes no difference that there has not been time to give such notice,

against three persons who had been in partnership together at Liverpool, but one of whom (Humble) had retired, it was proved that, upon his retirement, the new name of the firm was painted upon the counting-house, and the winding up of the affairs of the old partnership was removed to another place in Liverpool, and circular letters announcing the change of partners were sent to the correspondents of the old firm, but there was no public advertisement of the change, nor any notice of it proved which could expressly affect the plaintiffs, the Court of King's Bench held that these circumstances were a sufficient notification to all the world, of the change in the firm, and that the action was not maintainable against Humble.[1] In like manner it has been ruled that a change of the form of checks in a banking-house is, without any advertisement in the Gazette, or circular letter

---

or that for any reason it was not practicable, and it is not enough that the fact of the dissolution has become notorious, if the notice required by law has not been given, and the party giving credit to the partnership has no actual knowledge of the dissolution. Martin v. Searles, 28 Conn. 43; Mechanics' Bank v. Livingston, 33 Barb. (N. Y.) 458. Whether or not a creditor had actual notice of the dissolution of a partnership is a question of fact for the jury, and it is not error to decline giving them a binding instruction, that a certain course of dealing with the remaining partner was evidence from which they ought to infer actual notice of the dissolution, especially where there is some evidence of want of notice. Deford v. Reynolds, 36 Penn. St. 325. Where, in an action on a book-account against two copartners, one defended on the ground of a dissolution of the partnership and notice to plaintiff before goods bought, proof of advertisement of dissolution, in a paper which plaintiff did not take, or of defendant's declarations to plaintiff that he was going out of the firm, but that his money would remain in it, will not amount to notice. Williamson v. Fox, 38 Penn. St. 214. Where one who has been in the habit of dealing with a firm makes advances upon property pledged to him by some of the partners, he is not to be prejudiced by the withdrawal of one of the members without due notice thereof. Williams v. Birch, 6 Bosw. (N. Y.) 209. Notice published in a newspaper, where the partnership business is carried on, is not sufficient notice to parties who have had prior dealings with the firm. Articles of dissolution of partnership are admissible in evidence without an offer to follow it up by proof of actual notice before the debt sued for was contracted, especially where evidence has been given from which notice might be inferred. A bill of goods sold, made out to one of the partners and not to the firm, is evidence to go to the jury without restriction; but the declarations of the party purchasing made at the time are admissible in rebuttal to show why the goods were so charged. Little v. Clark, 36 Penn. St. 114. But notice of the retirement of a dormant partner need not be given except as to those who know of his connection with the firm. Thus: B having been a dormant partner with T under the style of "The Atlantic Forge Company," the firm was dissolved, and a new firm was formed by T with a third person, under a different name, to conduct the same business at the same place, and the new firm sent notice by mail to all persons who had transacted business with the old firm. A person who had never dealt with the old firm sold goods nominally to T, and took the note of the new firm therefor. The jury found that the dissolution and formation of the new firm were matters of public notoriety and it was held that the retiring partner was not liable for the goods so sold, although the vendor, at the time of the sale, supposed him still to be a partner. Holdane v. Butterworth, 5 Bosw. (N. Y.) 1.

[1] M'Iver v. Humble, 16 East, 169; see Hart v. Alexander, 2 Mees. & W. 484.

to the customers, sufficient notice of an alteration of the firm to a creditor who uses such checks.[1]

However, in all cases, the proper mode of giving notice of a dissolution is to insert such notice in the Gazette, and also to send it round to the correspondents of the house. This has been ruled to be ample notice.[2]

Permitting name to be used in the firm after retirement.

SEC. 538. But it matters not what notice is given of a partner's retirement if he still retain his name in the firm. Until his name be removed, he will be liable for partnership contracts. Thus, where a retiring partner permitted his name to remain over the shop door after notice of dissolution in the Gazette, and, while his name so remained, a bill was accepted in the name of the firm, the retiring partner was held liable on this acceptance.[3] Again, A, B, and C were partners. B retired from the firm, but it was agreed that his name should continue until a future day. A afterward drew a note in the name of the old firm payable to D. Before this note was drawn, B informed D that he had ceased to be a partner, but that his name was to continue for a certain time. It was held that B was liable on this note, notwithstanding such communication made to D; for that D knowing that B's name was to be continued, knew that he was therefore responsible, and of course he relied on that responsibility.[4]

Rule as to dormant partners.

SEC. 539. A dormant partner is only chargeable to third persons, in respect of contracts entered into by the firm during the time he is actually a partner, and is receiving the emoluments and profits of the business, for third persons have never trusted to his credit.[5] Therefore, upon a dissolution between an ostensible and a dormant partner, it is

[1] Barfoot v. Goodall, 3 Camp. 147.

[2] Newsome v. Coles, 2 Camp. 617; Jenkins v. Blizzard, 1 Stark. 418. Creditors may be expected to look into the Gazette for notices of the dissolution of partnership. Munn v. Baker, 2 Stark. 255. But in matters unconnected with partnership, and which are for the benefit of the person giving notice, as when he states in the Gazette that he intends to limit his responsibility in the course of his trade, the Gazette will be weak evidence in his favor, as between him and his creditors, unless the latter can be proved to have been in the habit of reading that paper. Leeson v. Holt, 1 Stark. 186.

[3] Williams v. Keats, 2 Stark. 290; Dolman v. Orchard, 2 Car. & Payne, 106. But where the retiring partner's name is retained in the firm, without his permission, by the remaining partner, the former is not bound to apply to the Court of Chancery for an injunction to restrain such use of his name where due notice of the retirement has been given. In such case, it is the duty of persons taking securities in the name of the old firm, to inquire who are designated by that firm. Newsome v. Coles, 2 Camp. 617.

[4] Brown v. Leonard, 2 Chit. 120.

[5] Evans v. Drummond, 4 Esp. 39.

not necessary for the protection of the latter from transactions subsequent to the dissolution that notice of such dissolution should be given to the creditors of the firm.[1] Even where a person has retired from a firm, who, though intentionally a dormant partner, was known to *many* as a member of the firm, he will not, by failing to give notice of his retirement, become liable to the creditors of the remaining partners, if such creditors, at the time of their respective contracts, were ignorant that he was ever a partner.[2]

But a dormant partner will be liable to the *whole* amount of a debt due during his copartnership, whether his connection with the firm be or be not known to the creditor at the time of the contract. Wilkinson had been a dormant partner in a ship with one Cay, but had retired. Robinson, the plaintiff, supplied the ship and the captain with stores and cash on account of the ship, to the amount of 1,000*l.* and upwards. The amount of the debt, at the time of Wilkinson's retirement, was 401*l.* 16*s.* 1*d.* Cay having become insolvent, the Court of Exchequer held clearly that Robinson was entitled to recover against Wilkinson the total sum of 401*l.* 16*s.* 1*d.* (with a trifling deduction on a particular account), although, when the goods were supplied, Robinson had no knowledge that Wilkinson was a partner. "A party," said Graham, B., "has always a right against a concealed partner of whom he has previously had no knowledge, as soon as he discovers him, unless that ignorance were his own fault, as, if he had not used due diligence in finding him."[3]

Where the partnership of a dormant partner is known to one particular creditor, he will be liable to that creditor, until he has notice of the partner's retirement. Due notice ought, therefore, to be given to such creditor.[4]

Liability for specialty contracts.

SEC. 540. Having disposed of the preliminary subject of notice of dissolution, we will endeavor to investigate a variety of questions relative to the retiring partner's liability.

It may be premised that contracts by specialty will of course be binding on the partners who have executed them, notwithstanding

[1] Brooke v. Enderby, 2 Brod. & Bing. 71; 4 Moore, 501. Per Patteson, J., Heath v. Sansom, 4 B. & Ad. 177.

[2] Carter v. Whalley, 1 Barn. & Adolph. 11. See Jones v. Shears, 4 Add. & Ell. 832.

[3] Robinson v. Wilkinson, 3 Price, 538; and see, as to ignorance by the creditor of the dormant partnership, Wintle v. Crowther, 1 Cromp. & Jerv. 316; Vere v. Ashby, 10 B. & C. 288; Ex parte Gellar, 1 Rose, 297; Gardiner v. Childs, 8 C. & P. 345.

[4] Evans v. Drummond, 4 Esp. 89.

their retirement. And where a lease has been taken in the partnership name, a retiring partner, if he means to absolve himself from liability for future rent, should see that the lease is properly surrendered. Where a lease was taken by A and B, partners, for seven years from 1827, and A retired in 1829, and afterward B entered into partnership with C, it was held that, as no surrender of the lease was executed on A's retirement, he was still liable for rent, although the landlord had notice of his retirement, and received rent both from B singly, and from B & C as partners, and wrote a letter to his attorneys (which, however, was not sent), directing them to make out a lease to B & C.[1]

Not generally bound by new contracts — Pinder v. Wilks.

SEC. 541. Generally when a *bona fide* dissolution has taken place, the retiring partner will not be bound by any *new* contract entered into by the remaining partners.[2] This doctrine was carried to so great a length in Pinder v. Wilks[3] as to make that case extremely doubtful, though decided by a judge of great authority. There, three partners, A, B and C, ordered goods from abroad by means of an agent, in whose name the bill of lading was made out. They afterward dissolved partnership, and made over their property to trustees, for their creditors, leaving A and B to settle the affairs of the firm. The goods arrived, and were delivered to A and B. In an action against A, B and C for the freight, Gibbs, C. J., held that, inasmuch as an implied *assumpsit* for the freight did not arise until delivery of the goods, and C had left the partnership before the delivery, C was not liable for the freight. And this decision was confirmed by the Court of Common Pleas.

Upon consideration of this case it seems difficult not to think that C, by joining in the contract, incurred an inchoate responsibility, which was made complete by the subsequent delivery of the goods; and, therefore, that he ought to have borne all the consequences of his contract.

Not bound by instrument negotiated after dissolution — Abel v. Sutton.

SEC. 542. Where a *bona fide* dissolution has taken place, the retiring partners are not to be bound by instruments negotiated in the

[1] Graham v. Whichelo, 1 C. & M. 188.

[2] But in the absence of knowledge by a creditor, notice need not be given. Deford v. Reynolds, 36 Penn. St. 325; Scott v. Colmensill, 7 J. J. Marsh. (Ky.) 416; Magill v. Merrie, 5 B. Monr. (Ky.) 168; Davis v. Allen, 3 N. Y. 168.

[3] 1 Marsh. 248; 5 Taunt. 612.

name of the original firm after such dissolution. In Abel v. Sutton,[1] the defendant and one Poynter had carried on business in partnership under the firm of "James Sutton & Co." The partnership had been dissolved and due notice given. It appeared that the note on which the action was brought was an accommodation note, created after the dissolution of the partnership, although it bore date before, and that the partnership name was put on by Poynter alone, without authority from the defendant; or that, even if it existed prior to the dissolution, it had not been put into circulation until after. The jury, under the direction of Lord Kenyon, found a verdict for the defendant. "To contend," said his Lordship, "that this liability to be bound by the acts of his partner extends to time subsequent to the dissolution, is, in my mind, a most monstrous proposition. A man, in that case, can never know when he is to be at peace and retired from all concerns of the partnership."

Rule in Kilgour v. Finlyson.

SEC. 543. The same point had been treated as settled in the previous case of Kilgour v. Finlyson,[2] in which, though the terms of the notice of the dissolution in the Gazette were, that "all demands upon the above firm will be paid by A (one of the partners), who is empowered to receive and discharge debts due to the said copartnership;" yet it was clearly admitted that A was not thus authorized to draw or indorse bills in the name of the partnership after the dissolution, and that no action could be maintained on such bills.

---

[1] 3 Esp. 108. See Heath v. Sansom, 4 B. & Ad. 172. Where, after the dissolution of a partnership, a person, who has been a clerk in the concern, is employed to wind up the affairs, and in the course of such employment negotiates a bill in the name of the firm, it is doubtful whether he can be sued upon the bill, not being a party to it, and at all events if an action be brought against him on the bill, some proof must be given that he had no authority to negotiate such bills, or that he acted *mala fide*. Wilson v. Barthrop, 2 M. & W. 863.

[2] 1 H. Bl. 155. In this case it appeared that Scott was indebted to the partnership of Finlyson & Co., and Finlyson & Co. indebted to Sterling. After the dissolution of the partnership, Finlyson drew a bill in the name of the firm, and indorsed it in the name of the firm, accepted by Scott, to Kilgour. Kilgour discounted the bill by giving his promissory note for it. Finlyson then indorsed the note to Sterling who discounted it, but retained the discount in discharge of the debt due to him from the firm of Finlyson & Co. The note became due before the bill, and Kilgour paid Sterling the amount of the note when due. It was admitted that Kilgour could not recover on the bill, but the court also held that he could not recover in an action against the partnership for moneys paid to the use of the partnership. Lord Loughborough said: "When this note became due, the plaintiff paid it to Sterling, but at that time no debt was owing to him from the partnership; the payment, therefore, of the plaintiff was not a payment to the use of the partnership. Though the money, raised by discounting his note before it was due, was in fact paid in discharge of a partnership debt, yet he cannot follow the money through all the applications of it made by Finlyson.

May give power to remaining partner to indorse in old name.

SEC. 544. There is no doubt, however, that a retired partner may give authority by parol to a continuing partner, to indorse bills in the partnership name after the dissolution of the partnership. And where the retired partner stated that he left the effects and securities of the firm in the hands of the continuing partner for the purpose of winding up the concern, and that he had no objection to his using the partnership name, it was held that the jury were justified in finding that the continuing partner had authority to indorse promissory notes so left in his hands in the partnership name.[1]

Acceptance in name of old firm after dissolution not binding.

SEC. 545. An acceptance given in the name of the firm by the remaining partner, after dissolution, is not binding on the retired partner,[2] although the bill be dated before the dissolution.[3] So an acceptance, given under similar circumstances to a person who had notice that the partnership was intended to be dissolved, cannot be enforced against the firm.[4]

Wrightson v. Pullan — Usher v. Dauncey.

SEC. 546. Lord Kenyon, at *Nisi Prius*,[5] expressed a doubt whether even if a bill were actually indorsed before the dissolution, but not sent into the world until afterward, such an indorsement would be valid. But it is to be remembered that the signature and indorsement are the acts which are obligatory on the makers. If, therefore, those acts were performed on a blank paper, stamped with a bill stamp before dissolution, and the bill were filled up and negotiated by the remaining partners after dissolution, the original partners would nevertheless be liable on the bill, and would be estopped as against an innocent indorsee, from saying that it was irregularly negotiated.[6] This is deducible from the case of Usher v. Dauncey,[7] in which, however, the dissolution took place by the *death* of one partner, and, consequently, the surviving partners only, and not the representatives of the deceased, were liable in the action, but, on the principles of that case, a *retiring* partner would be held liable under similar circumstances. The facts were as follows: The defendants, together with Frederick Dauncey, had traded under the style of

[1] Smith v. Winter, 4 M. & W. 454.
[2] Ex parte Liddiard, 2 M. & A. 87; 4 Dea. & Ch. 603.
[3] Wrightson v. Pullan, 1 Stark. 375.
[4] Paterson v. Zachariah, 1 Stark. 71.
[5] In Abel v. Sutton, 3 Esp. 108.
[6] See Russell v. Langstaff, 1 Doug. 513; Snaith v. Mingay, 1 Mau. & Sel. 87.
[7] 4 Camp. 97.

Daunceys, Cock & Co., and they had been in the habit, for the purposes of raising money, of drawing bills on H, which were discounted through the medium of a bill-broker. These bills were annually drawn and indorsed in blank, and filled up with dates and sums, as the urgencies of business required. The bill, which was the subject of the action, had been drawn and indorsed in blank by Frederick Dauncey, in the partnership firm of Daunceys, Cock & Co., in February, 1814, and given by him to a clerk, with a number of similar blanks, to be filled up for the use of the partnership. He died in March. The style of the firm was then changed to Daunceys & Squire. Afterward, in April, the clerk of the defendants (not having, as he alleged, any blanks in the new firm) filled up the bill in question by inserting the date and sum, as usual. The bill was accepted by H, and discounted by the plaintiffs, who brought their action on the bill against the surviving partners. At the trial, Lord Ellenborough expressed his opinion that, after the death of Frederick Dauncey, the bill might still be filled up so as to bind the survivors. The plaintiffs had a verdict, which the Court of King's Bench afterward refused to set aside.

Effect of dissolution upon interest of partners in the firm property.

SEC. 547. The moment the partnership ceases, the partners become tenants in common of the partnership property undisposed of from that time. They become, therefore, tenants in common of all partnership securities unindorsed, which were not issued before the dissolution. If, therefore, it be necessary to put such securities in circulation, while the accounts are unliquidated, all the late partners must join in making them negotiable. In the words of Lord Kenyon: "If a bill is sent into circulation after the dissolution of a partnership, beyond all controversy, all the partners must join in the indorsement, and one, by putting the partnership name, cannot bind the rest."[1] And if a bill be drawn by A after dissolution of his partnership with B, and the proceeds of the bill are applied to pay the partnership debts of A & B, which A, on the dissolution, had assumed to pay, the holder of the bill can have no claim on B, in consequence of the particular appropriation of the proceeds.[1]

[1] 3 Esp. 110; and see Carvick v. Vickery, Doug. 653. In Adams v. Bingley, 1 M. & W. 192, A & B being partners, C borrowed money of the firm, and gave a promissory note for it, payable to B only. A knew of the loan, but it is not stated whether he knew of the security. A & B afterward dissolved partnership with notice that all persons indebted to the concern should pay their debts to A. Afterward, B indorsed the note to A for valuable consideration. It was

How he may be discharged from contracts — Clayton's case.

SEC. 548. In what has preceded we have directed our attention to the liability which a retiring partner may possibly incur in respect of contracts made by the remaining partners. We have likewise seen that this liability may be avoided by proper caution. It now remains to consider by what means the retiring partner's responsibility for contracts made by the firm while he was a member may be discharged either by operation of law or by special agreement with the creditor. The various degrees of liability of a retiring partner, or (as it will be seen afterward) of a deceased partner's estate, to the creditors of the original firm, is strongly illustrated by those cases where there are *cash accounts current* between the firm and its customers.

Generally, where divers debts are due from a person, and he pays money to his creditor, the debtor may, if he pleases, appropriate the payment to the discharge of any one or other of those debts; if he does not appropriate it, the creditor may make an appropriation; but if there is no appropriation by either party, and there is a current account between them, as between banker and customer, the law makes an appropriation according to the order of the items of the account, the first item on the debit side of the account being discharged or reduced by the first item on the credit side.[1] These general principles were fully established and enforced by Sir William Grant, in Clayton's case,[2] "which was a case decided upon great consideration, and is an authority of great weight."[3] There, the claim of Clayton against the estate of the deceased partner, Devaynes, under an account current with the house of Devaynes & Co., was limited and adjusted according to the principles above stated.

Rule in Brooke v. Enderby.

SEC. 549. To apply these principles to cases of retiring partners. Where there is a cash account current between a firm and a customer, and the account is in favor of the latter, a retiring partner will be liable for the balance of this account at the time of his retirement. But if the account be continued, the balance for which the retiring partner is liable will be diminished by every payment which is made by the new firm, supposing such payments not to be appropriated to the discharge of any specific item; because, in this case, it is the

held that A might sue C on the note, notwithstanding that B, after indorsing it to A, fraudulently obtained a fresh security from C, under promise of delivering up the note.

[1] Le Roy v. Johnson, 2 Peters (S. C. R.), 186.

[2] Per Lord Lyndhurst, 4 Russ. 468.

[3] 1 Mer. 572.

[4] D. Abbott, J., 2 Barn. & Ald. 46.

first item on the debit side of the account which is discharged or reduced by the first item on the credit side. In the case of Brooke v. Enderby,[1] Enderby was partner with Gilpin, in the business of woolen-draper, army clothier, and army agent, for the term of ten years. The plaintiff, Brooke, a lieutenant-colonel in the army, employed Gilpin as his agent, and likewise kept a running account with Gilpin as his banker, Gilpin from time to time receiving the pay and allowances, and also the dividends due to the plaintiff on stock and other moneys on his account. Gilpin carried on business in his own name only. Enderby never interfered with the business, and was unknown to the plaintiff as a partner with Gilpin until after the bankruptcy of Gilpin. After the 24th September, 1817, the day on which the partnership of Gilpin & Enderby expired by effluxion of time, and until Gilpin's bankruptcy, the dealings between Brooke and Gilpin were continued in the same manner as before, and the account between them was kept as before, no rest being made, nor balance struck in the account from the 1st July, 1816, down to the bankruptcy of Gilpin. There was at all times a considerable balance due to Brooke. After the bankruptcy of Gilpin, Brooke brought his action against the partners, to recover the amount due to him, to which action Gilpin pleaded his certificate, and Enderby pleaded the general issue and paid 1,773*l.* 9*s.* 4*d.* into court. In calculating this sum Enderby sought credit for all sums paid by Gilpin to the plaintiff after the 24th September, 1817, without giving credit for any sums received after that day by Gilpin, on account of the plaintiff. The Court of Common Pleas, on the authority of Clayton's case, held this mode of calculation right, and, as Enderby had paid into court more than the amount of what was due to the plaintiff at the expiration of the partnership, they gave judgment of nonsuit.

In case of a continuance of new partnership — Newmarch v. Clay.

SEC. 550. But it is to be remarked that, in stating the principle of payment which is now under our consideration, Sir William Grant applied his observations to those accounts only which are in the nature of a *banking account.* In Clayton's case, which is the foundation of all the modern decisions on this subject, he says: "This is the case of a banking account where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. There is no room for any other appropriation than that which arises

[1] 4 Moore, 501; 2 Brod. & Bing. 70.

from the order in which the receipts and payments take place and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts." Now, it may be inferred from these observations that in accounts current of a different nature, where there is room for appropriation other than that which arises from the order of the receipts and payments, such other appropriation will be deemed necessary in order to reduce the retiring partner's debt. Suppose, for instance, as in the case of Newmarch v. Clay,[1] that goods are regularly furnished to a firm, for which they as regularly pay by *bills*, and that an account is kept of the goods furnished and the bills paid. In such case, if a partner retire, and the accounts go on as before, the bills drawn after his retirement will not, like money payments, go in discharge of the debt due from him on this current account, unless such bills be specifically appropriated to that purpose, because the bills so drawn are the property of the new firm, and are *prima facie* appropriated to the payment of the debts of that firm.

This was assumed in the case of Newmarch v. Clay, where the only question was, whether there was sufficient evidence of the appropriation to discharge the retiring partner. The plaintiffs brought their action for goods sold and delivered, against Clay and W. and T. Lumb. It appeared that Clay had been a secret partner with the Lumbs, and that this secret partnership was dissolved by consent on the 1st December, 1808; after which the business was carried on by the Lumbs only. The goods had been uniformly furnished at a credit of six months on bills. By the account, as produced at the trial, it appeared that the amount of goods delivered, up to the time of the dissolution, was 261*l.* 19*s.* 10*d.*, and that the first item on that side of the account after the dissolution, was — "1809, May 26, To goods at do., (*i. e.* at six months' credit), due 26th November, 52*l.* 12*s.*" The amount of payments up to the time of the dissolution was 130*l.*, and the items next following on that side of the account were, "1809, March 25, By bill, 65*l.*," "January 16, By bill, 100*l.*" (which bills were dishonored), and then — "December 1, By bills, 141*l.* 1*s.*" It appeared by the date of the dishonored bills, that Clay was interested

[1] 14 East, 239.

in them, they would clearly, therefore, if good, have been applicable to the discharge of the 261*l.* 19*s.* 10*d.* It was proved that the payments contained on the credit side of the account were all paid without any express appropriation at the time, and even when the last bills for 141*l.* 1*s.* were received, there was no specific agreement that that sum was to be applied in part discharge of the dishonored and returned bills of 65*l.* and 100*l.*; but these latter were in fact delivered up at the time. Under these circumstances, the question was, whether the last item of credit for 141*l.* 1*s.* should be added to the other sum of 130*l.*, and applied in discharge of the 261*l.* 19*s.* 10*d.* (in which case the plaintiffs would be overpaid by the new partnership to the amount of 9*l.* 1*s.* 2*d.*), or whether it should be applied in discharge of the 52*l.* 12*s.* as well as to the 261*l.* 19*s.* 10*d.* (in which case there would be due to the plaintiffs 43*l.* 10*s.* 10*d.*) It was urged on behalf of the defendant, Clay, that the act of taking up the dishonored bills, upon the payment of the bills for 141*l.* 1*s.*, which sum was more than sufficient to cover all former debts, was evidence of an implied appropriation of the latter bills to the purposes intended to have been answered by the former, and that Clay therefore was entitled to the benefit of such appropriation. And the Court of King's Bench were of that opinion. "There might," observed Lord Ellenborough, "be a special application of a payment made, arising out of the nature of the transaction, though not expressed at the time in terms by the party making it, and here the payment of the bills for 141*l.* 1*s.* was evidenced by the conduct of the parties to have been made for the purpose of taking up the antecedently dishonored bills, in the discharge of which the defendant, Clay, was interested, for, upon receiving this payment, the dishonored bills were delivered up."

Money of new partnership applicable only to debts of new firm.—Thompson v. Brown.

SEC. 551. In the preceding case, if the bills for 141*l.* 1*s.* had not been specifically appropriated to that purpose, they would not have been applied in discharge of the retiring partner's debt. On the contrary, inasmuch as they were the property of the new partnership, they would have been considered as applicable to the discharge of the debts of that partnership only. In the same manner, where a sum of money can be deemed as the specific property of the new partnership, it will be applicable to the discharge of the debts of that partnership only. In the case of Thompson v. Brown,[1] the plaintiff brought an

[1] 1 Mood. & Malk. 40. The new partnership, it will be perceived, arose on the accession and not the retirement of a partner, but the principle is the same.

action against Brown and Weston for goods sold and delivered. The defendants became partners in trade on the 1st January, 1824, and continued so until the 1st January, 1825. Before the partnership, Brown was indebted to the plaintiffs, who were ironmongers, in the sum of 64*l.*, and during the partnership goods were supplied on the partnership account to the amount of 210*l.* Early in the year 1824, Brown paid to the plaintiff, on the general account, a check for 60*l.*, and, after the dissolution, 150*l.* was paid *expressly for the partnership debt* by Weston, Brown having become insolvent. It was doubtful, on the evidence, whether the check was the property of the partnership, or the sole property of Brown, and it was contended for the plaintiffs that the payment (of that check) having been made without any appropriation, the defendants were at liberty to apply it to the first items in the account, and in that case, the defendants, as partners, would still be liable for the balance of the partnership debt. Abbott, C. J.: "The general rule certainly is, that when money is paid generally, without any appropriation, it ought to be applied to the first items in the account; but the rule is subject to this qualification, that when there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the payment of the debt of the individual; that would be allowing the creditor to pay the debt of one person with the money of others. (*To the jury*) The question for you is, was this check the property of the partner or not?" Verdict for the defendants.

Appropriation of payments by the payee—Simpson v. Ingham.

SEC. 552. To render an appropriation of payment by the act of the party valid, it must be made at the time of payment, if made by the payor,[1] and within a reasonable time after payment if made by the payee. Sir William Grant was inclined to hold, according to the principles of the civil law,[2] that the appropriation, even if made by the payee, must be made at the time of payment. But cases might be stated where such a rule, if strictly adhered to, would be productive of injustice, and it is manifestly at variance with the decis-

[1] It is not necessary, however, that a person owing money on two different accounts should declare the appropriation of it at the time of payment; it is sufficient if it can be collected from other circumstances, that he intended, at the time of payment, to appropriate it to one account specifically. Shaw v. Picton, 4 Barn. & Cres. 715; Waters v. Tompkins, 2 C., M. & R. 723.

[2] Dig. lib. 46, tit. 3, ss. 1, 3.

ions on this subject in the courts of common law. On the other hand, those courts have been inclined to favor the creditor too much, and have in many cases "extended the proposition — that if the debtor does not apply the payment, the creditor may make the application to what debt he pleases — much beyond its original meaning, so as in general to authorize the creditor to make his election when he thinks fit." In a modern case, however, the Court of King's Bench came to a very just decision on this important subject. Thus, in Simpson v. Ingham,[1] an action on a bond was brought by Bruce & Co., bankers, against the heirs and devisees of Benjamin Ingham. The bond was given by Ingham and another, bankers, at Huddersfield, to the plaintiffs, their London correspondents, conditioned for remitting money to provide for bills, and for the repayment of such sums as Bruce & Co. might advance on account of persons constituting the Huddersfield Bank. The damages were assessed by an arbitrator at 13,845*l.*, subject to the opinion of the court upon the following facts: The house of Bruce & Co. were in the habit of sending to the Huddersfield bank monthly statements of their accounts. Benjamin Ingham died in September, 1811. The last statement sent previously to his death was for the month of August. The balance of that account was greatly in favor of Bruce & Co. No alteration in the account was made in the books of Bruce & Co. immediately on the death of Benjamin Ingham, but, during the residue of that month and a part of October, the remittances made by the Huddersfield bank, and the payments made for them by Bruce & Co., were entered in continuation of the former account. Before, however, any account was transmitted to the Huddersfield bank subsequent to that for August, Bruce & Co., in consequence of a communication with their solicitor, opened a new account, and in that inserted all the remittances and payments made subsequent to the death of Benjamin, and in November they transmitted to the Huddersfield bank statements of two accounts. The first of these accounts was thus entitled: "Debtors, Messrs. B. and J. Ingham & Co. (old account), in account with Bruce & Co., creditors;" and the first item on the debit side was the balance of August. The second account was in the same form, but entitled "new account." This account began on the 16th September, without any balance brought forward, and contained the remittances and payments made during that month, subsequent to the death of Benjamin, and also those made in the

[1] 2 Barn. & Cres. 65; 3 Dowl. Ryl. 249.

month of October. From this time the old and new accounts were kept separate in the books of Bruce & Co. The Huddersfield bank did not appear to have ever objected to the accounts being kept separately by Bruce & Co., although in their own books they only kept one account. The arbitrator was of opinion that, under these circumstances, the balance due on the death of Benjamin Ingham was not discharged by subsequent payments by the new firm; accordingly, after making certain allowances for dishonored bills, he assessed the damages at the sum above awarded, and the Court of King's Bench held the award to be right.

In the preceding case the court proceeded on the principle that the entries which had been continued in the creditor's books immediately on the death of Ingham, not having been communicated to the debtors, were not conclusive on the creditors, and consequently that the general legal appropriation of which such entries would otherwise have been evidence was incomplete. It is clear from this, as also from the express opinions of the judges, that they did not consider it necessary, in order to support any alleged appropriation on the part of the creditor, that he should prove it to have been made at the time of payment. On the other hand, if payment be made to the creditor of any sum in respect of an account current, the creditor making no appropriation at the time of payment, and if after such payment the debtor and creditor continue their mutual dealings, or do any other mutual act in respect of the same account, the creditor will be barred by such subsequent transactions from establishing an appropriation of the payment.

Contract of remaining partner to pay all debts — Effect of.

SEC. 553. It frequently happens that upon the retirement of a partner, the remaining partners undertake to pay the debts and receive the credits of the firm. This, as has been already observed, is a private regulation between the parties, which cannot be binding as between the creditors and a retiring partner without consideration. A consideration will arise in favor of the retiring partner, either if the creditor derive some benefit from this agreement, or the retiring partner sustain some prejudice from it on the creditor's account. We will endeavor to distinguish the cases in which such a consideration has been presumed in favor of the retiring partner, from those in which he has been held liable for the partnership debts, for want of a sufficient consideration moving to the creditor for his assent to the retiring partner's exemption..

It was held in an early case in equity that if, after the retirement of one of two partners, their joint bond creditor leave his money in the hands of the remaining partner and receive from him an increased rate of interest in consideration of not calling in the principal, this is not such an assent to the sole credit of the remaining partner, as will exempt the retiring partner's residuary legatee from liability in respect of the bond. The decision, however, in this case, depended in a great measure on the nature of the security. There was clearly not sufficient evidence of fraud in the creditor to induce a court of equity to set aside the bond, and accordingly Lord Chancellor Parker observed, "that the plaintiff's changing the interest did not alter the security, *for still it was the bond of both.*"[1]

The principles which we are now discussing have been adopted more decidedly in modern cases, in which the creditor has either, 1, taken the securities of the remaining partners for a debt due from the old firm, or 2, received interest from the new firm for such debt, or, 3, continued an account current with the new firm, apparently adopting such account.

In some of the States of this country, particularly in New York, (adopting the modern English rule, that will be referred to before this chapter is closed), it is held that, upon the retirement of a partner, under an agreement with the remaining partners to pay all the debts of the firm, the retiring partner becomes a mere surety for the remaining partners, as between themselves, and that he assumes the same relation to all the creditors of the firm, who have notice of his retirement, and the agreement of the remaining members to pay the debts, and after such notice, if the creditors do any act that would discharge an ordinary surety, he is discharged thereby.[2]

[1] Heath v. Percival, 1 P. W. 682.

[2] In Colgrove v. Tallman, 67 N. Y. 95, the defendant Tallman sold out his interest in a firm in which he was associated, to one Barnes, his copartner, who agreed to pay all the firm debts. This fact was notified to the plaintiffs who, at the time the defendant sold out his interest in the business under the agreement above named, held a note against the firm which was then overdue. Tallman, a few days after the sale, notified the plaintiff of the arrangement, and requested him to proceed and collect the note. Barnes at that time was solvent, and able to pay. The plaintiff did not proceed to collect the note, and two years afterward Barnes failed, and the plaintiff sought to collect the note of the defendant. The court held that he was not entitled to recover, following the rule in Oakley v. Pashlee, 10 Bligh (N. P. R.), 548. "By the dissolution," says Folger, J., "of the copartnership and the transfer of all the property to Barnes and his agreement with Tallman to pay all the debts of the firm, Tallman became, in equity, as between himself and Barnes, a surety for Barnes as principal debtor in those debts. Millard v. Thom, 56 N. Y. 402; Savage v. Putnam, 32 id. 501; Kinney v. McCullough, 1 Sandf. Ch. (N. Y.) 376; Morse v. Gleason, 64 N. Y. 204. When it was made known to Colgrove by Tallman that Barnes and Tallman had gone into this bargain

Where the creditors accept the remaining partners — Bedford v. Deakin.

SEC. 554. First, if, upon the retirement of a partner, the creditor of a firm take the securities of the remaining partners for his debt, this, it is conceived, will not operate as a discharge to the retiring partner if the creditor is allowed to retain the securities given to him by the original firm. In the case of Bedford v. Deakin,[1] the plaintiff was the holder of bills drawn by three partners. The bills were dishonored. Upon the dissolution of the partnership, Bickley, one of the partners, informed the plaintiff that an arrangement had been made by which he, Bickley, was to provide for these bills, and therefore requested the plaintiff to take his separate promissory notes for the principal, interest, and expenses due. To this the plaintiff ultimately agreed, at the same time *reserving strictly the security of the three partners.* It was held that this agreement did not operate as a satisfaction of the joint debt, and that, although the two other partners might be ignorant of the transaction, that would make no difference in their favor, for that a creditor giving time to one of three joint debtors does not discharge the others.

When bill or note is indorsed with reservation of rights against all — Featherstone v. Hunt.

SEC. 555. Again, if a person hold a copartnership bill, and, upon the retirement of one of the partners, indorse it over to the new firm for payment, at the same time expressly reserving his rights on all the parties to it, in case it should not be paid by the new firm, the retiring partner will still be liable in an action on the bill. In the case of Featherstone v. Hunt,[2] it appeared that Hunt, Stab, and Preston were partners at Newfoundland, and that Hunt carried on trade separately at London. Goods were furnished by Featherstone to Hunt, Stab & Preston, for which they gave him a bill drawn by

which was thus made between them, Colgrove became bound to Tallman in equity to observe it. Thus, if he had made a valid agreement with Barnes to extend the time of payment of the note made to him by the firm, Tallman would have been discharged. Millard v. Thom, 56 N. Y. 402. This could be only on the ground that extension of the time of payment of a debt granted by a creditor to a principal debtor, acts as a discharge of a surety of the debt, from his liability. * * * It is the settled law of the State that the surety, while the principal is solvent, may require the creditor to collect the debt, and if he refuses to do so, and the principal becomes insolvent, he has no claim upon the retiring partner." Hubbard v. Gurney, 65 N. Y. 457; Payne v. Packson, 13 Johns. (N. Y.) 174; Key v. Baldwin, 17 id. 384; Remsen v. Beekman, 25 N. Y. 552; Smith v. Sheldon, 35 Mich. 42.

[1] 2 Barn. & Ald. 210. See, also, Harris v. Lindsay, 4 Wash. (U.S.C.C.) 98; Pope v. Nance, 1 Stew.(Ala.) 354; Patterson v. Camden, 25 Mo. 13; Maxwell v. Day, 45 Ind. 509; Grandolpho v. Appleton, 40 N. Y. 533; see, also, *ante*, p. 865, n; Barnard v. Torrence, 5 Gill & J. 383.

[2] 1 Barn. & Cres. 113; 2 Dowl. & Ryl. 233.

their firm on Hunt. The bill was dishonored. Hunt afterward retired from the firm. Featherstone indorsed the bill to the new firm of Stab & Preston, and sent it to Preston, in order, if possible, to obtain payment of it, but strictly reserving his rights on all the parties to it. Hunt also sent out an agent to settle his accounts with the new firm. On settling the accounts, Stab & Preston told Hunt's agent that the bill was paid, but they gave him no proof of that fact, nor was the bill produced to or seen by Hunt's agent. The Court of King's Bench held clearly, under these circumstances, that Hunt's liability was not discharged.

Where the creditors accept new security — Evans v. Drummond.

SEC. 556. But if, upon the retirement of a partner, a creditor of the firm give up the security which he has against them, and take in exchange a fresh security from the new firm, this will be binding on the creditor, and will operate as a discharge to the retiring partner. In the case of Evans v. Drummond,[1] Combrune and Drummond were partners. Goods having been furnished to the firm, a partnership bill was given for the amount. Drummond afterward retired from the firm, with the full knowledge of the creditor. After Drummond's retirement, and when the bill became due, it was renewed by another bill to the same amount, by Combrune. It being contended that Drummond was still liable, Lord Kenyon said: "Is it to be endured, that when partners have given their acceptance, and where, perhaps, one of two partners has made provision for the bill, the holder shall take the sole bill of the other partner, and yet hold both liable? I am of opinion, that when the holder chooses to do so, he discharges the other partner. Here the plaintiff has taken the bill of Combrune, after he was informed that Drummond had nothing to do with the concern, as he admits. It is a reliance on the sole security of Combrune, and discharges the defendant." Verdict for the defendant.

Rule in Reed v. White.

SEC. 557. So in Reed v. White,[2] a joint contract for goods sold was considered to be waived by the creditor taking the separate security of one of the joint contractors. An action was brought for cordage sold, against the defendants, as owners of a ship. White was the managing owner, or ship's husband. The plaintiff took White's bill for the

[1] 4 Esp. 89. [2] 5 Esp. 122.

amount, which was dishonored and renewed, and again dishonored. For the other defendants it was insisted that the plaintiff had discharged the other owners, who, in ignorance of this mode of dealing between the plaintiff and White, had suffered him to receive large sums of the East India Company for freight, which they would otherwise have detained. Lord Ellenborough: "If the plaintiff, dealing with White separately, has adopted him, he has discharged the others, and must have a verdict against him. The question is, whether it was intended as a settlement with him alone, and adopting him as the single debtor?" A full special jury of merchants found for the defendants.

Taking sole security of new firm, no written security previously existing — Thompson v. Drummond.

SEC. 558. And if the creditor, having previously no written security from the firm, take the sole security of the remaining partner for a debt due to him from the firm, that is strong evidence to show that he has accepted the sole security of the remaining partner in lieu of the joint responsibility of the firm. This was decided by the Court of King's Bench in the case of Thompson v. Percival,[1] in which the cases of Evans v. Drummond and Reed v. White were recognized and adopted as sound law. That was an action for goods sold and delivered. At the trial it appeared that the two defendants, James and Charles Percival, were in partnership until the 22d of December, 1829, when an advertisement was inserted in the "London Gazette," announcing the dissolution of the partnership, and that the business would be carried on by the defendant James, who would receive and pay all debts. The chief part of the goods in question was delivered before the dissolution, the other part was ordered by James Percival after the 22d of December. It did not appear that when these goods were delivered the plaintiffs had had notice of the dissolution. On the dissolution, effects were left in the hands of James sufficient to pay the debts due from the partnership. In the beginning of 1830, the plaintiffs' collector applied for the balance to James Percival, who told him that Charles knew nothing of these transactions, and that the plaintiffs must look to him (James) alone. The plaintiffs afterward drew a bill on James, at three months, for the mixed amount, which was accepted by James, and dishonored; and the plaintiffs gave him time to pay, but eventually brought an action against both defendants for the amount

[1] 5 B. & Ad. 925; 3 Nev. & Man. 167.

of the goods sold, and obtained a verdict. Upon these facts, the Court of King's Bench were of opinion that a new trial should be granted, for that if the plaintiffs had expressly agreed to take the separate acceptance of James, in satisfaction of the joint debt (the proof of which had not been insisted on at the trial), such agreement amounted to a discharge of Charles; and that the facts proved raised a question for the jury upon that point. And Denman, C. J., in the course of his judgment, adverted to an argument which had been used in that and other cases, that the acceptance of a bill of exchange by one of two debtors could not be a good satisfaction, because the creditor thereby got nothing which he had not before. In answer to this, his Lordship said, that the written security, which was negotiable and transferable, was of itself something different from what the creditor had before; and many cases might be conceived in which the sole liability of one of two debtors might be more beneficial than the joint liability of two, either in respect of the solvency of the parties or the convenience of the remedy, as in cases of bankruptcy, or survivorship, or in various other ways; and whether it was actually more beneficial in each particular case could not be the subject of inquiry.[1]

In this case the court did not think it necessary to determine whether the *assent* of Charles to the agreement between his brother and the plaintiff was necessary in order to give it operation as a discharge of Charles; because there was evidence of a delegation by Charles to James, to make such an agreement, for James had the partnership effects left in his hands, and was to pay all the partnership debts.

Ex parte Whitmore.

SEC. 559. The above observations of Lord Denman, so far at least as they relate to bankruptcy, seem to be borne out by the case of Ex parte Whitmore,[2] in which the creditor was anxious to revert to the separate security of one partner, in preference to the joint security of two, but failed in his attempt to prove against the separate estate. That was not a case of retiring partners, but it may be mentioned as connected with the principles laid down in Thompson v. Percival. The facts were shortly as follows: W. S. Warwick, who traded in London, was in the habit of accepting bills drawn on him by Jackson & Co., of New York, for the purpose of meeting acceptances given by Jackson & Co., at Warwick's request, to A. & J. Warwick, of

[1] And see Kirwan v. Kirwan.

[2] 3 Mont. & A. 627.

Virginia. W. S. Warwick afterward wrote to Jackson & Co., stating that he had formed a partnership with Clagett, and adding — "I beg you to consider all credits, advices and instructions *now in force from me*, as extending to the firm of Warwick & Clagett. Upon the receipt hereof you will please render your accounts with me, transferring any balances that may be either due to, or from me to the new firm." This letter was afterward confirmed by letters from Warwick & Clagett, in one of which they stated they had received from Jackson & Co. their statement of Warwick's account, which had been found correct, and that they had carried the balance due to him to new premises. They added — "We regard all subsequent operations as applying to the new firm, and have passed them accordingly." In answer to these letters, Jackson & Co. wrote a letter acknowledging the receipt of the communication from Warwick & Clagett, and adding — "We shall be very happy to cultivate the most intimate business relations with your firm, and will gladly avail ourselves of every opportunity to influence valuable business to your good arrangement. We shall make up and transfer to your new firm the open accounts in joint exchange transactions."

In pursuance of these arrangements Jackson & Co. drew bills upon Warwick & Clagett for the same purposes for which they had previously drawn upon Warwick, and these bills were accepted by Warwick and Clagett in the partnership name. Warwick & Clagett having afterward become bankrupt, Jackson & Co. were permitted by the commissioner under the fiat to prove against the separate estate of Warwick, for the amount of all sums paid by them in discharge of acceptances given by them to A. & J. Warwick, before they received the letters of Warwick & Clagett. But the Court of Review reversed the decision of the commissioner, being of opinion that Jackson & Co. intended to substitute the liability of Warwick & Clagett for the separate liability of Warwick, and that the circumstance of Jackson & Co. omitting in their letter to make express mention of bills, was not sufficient to counteract their promise to open accounts in joint exchange transactions, there being no evidence of the existence of any other account than what was called a joint exchange account.

Rule when creditors agree that retiring partner shall be simply surety of old firm —Oakley v. Pasheller.

SEC. 560. If the creditor of a firm agrees that the retiring partner shall be considered simply as a *surety* for the debts of the old partnership, and the creditor afterward, whether holding the partner-

ship securities or otherwise, give time to the new firm for payment of the debt, the retiring partner in his character of surety is thereby discharged. In Oakley v. Pasheller,[1] it appeared that Sir Charles Oakley in 1810 lent the house of Oakley & Sherrard 10,000*l.*, payable by bills, to become due on the 15th October, 1817, and the 15th January, 1818. In 1814 Sherrard died, having paid no portion of the debt. In June, 1815, a new partnership was formed, and upon that occasion a deed was executed between the executors of Sherrard and the new partners, whereby the latter undertook for certain considerations to pay the debt. Sir Charles Oakley having notice of this arrangement (which in the opinion of the court was held to constitute Sherrard's executors sureties only for the debt), continued to deal with the new firm, and adopted them as his principal debtors. He afterward gave time to the new house for the payment of the bills, and this indulgence was held to amount to a discharge of Sherrard's executors.

Where the creditors receive interest of the new firm — Gough v. Davies.

SEC. 561. *Secondly,* if a creditor receive *interest* from the new firm for a debt due from the old, this is not necessarily an adoption of the new firm as his sole debtors. In Daniel v. Cross,[2] where, after the decease of a partner, the creditors of the old firm had received interest for their debts from the new firm, Lord Loughborough held clearly that such receipt of interest would not discharge the estate of the deceased partner.

The principle was afterward applied to the case of a retiring partner, in the decision in Gough v. Davies.[3] There, Gibbons, the elder, Davies, and Gibbons, the younger, were partners in the business of bankers. The plaintiff, Gough, had a considerable balance in the bank, for which he held the accountable receipts of the firm. Upon the retirement of Davies from the firm, the balance of the plaintiff's account was brought forward into the concerns of the new firm. This was done without consulting him; but he knew of the dissolution and continued to deposit money in the bank after the new partnership commenced, for which he had the accountable receipts of the new firm sent to him for such deposits, from time to time, and each time a balance was struck the interest upon the whole sum,

[1] 10 Bligh (N. S.), 548; 4 Clarke & Finn. 207. As to the general doctrine of discharging the surety by giving time to the principal, see Rees v. Berrington, 2 Ves. 50; and Pitman on Principal and Surety, part 3, ch. 5. See *ante*, p.

[2] 3 Ves. 277.

[3] 4 Price, 200.

as well that part of it which was deposited before as that part which was deposited after the new partnership was formed, was calculated as upon one aggregate sum, without distinction. Gough, at various times after the dissolution, applied for and received several sums from the new partnership, as interest, calculated as above mentioned. The new firm became bankrupts. In an action brought by Gough against Davies, to recover the amount of the balance due at his retirement, one question left to the jury was, whether the plaintiff assented to the transfer of the credit from the old firm to the new, and the jury found for the defendant, thereby establishing the assent. The Court of Exchequer, however (*dissentiente* Garrow, B.), granted a new trial, considering the direction wrong, and that there was not sufficient evidence of assent to be left to a jury. Graham, B.: "The question left to the jury was, whether, under the circumstances, they would presume that the plaintiff had adopted the new firm as his debtors, to the release and discharge of the old. It does not appear to me, with deference to the learned judge, that the case furnished sufficient evidence to induce the jury to come to this conclusion. Gibbons the elder died in 1813, and the firm goes on without any alteration. No agreement is shown relating to what took place; no settlements of accounts; nothing is drawn from the plaintiff's mouth to show that he released the old firm; nothing has been adduced to make him appear to have trusted the new firm, but the mere fact that he goes on paying money to the new firm, and receiving interest. What more has he done than to say, 'I am perfectly willing to take your security for the new debt, but I don't release the old firm. I keep their accountable receipts.' The mere circumstance of his receiving interest of the surviving partner cannot release the old firm."

A recent case may be mentioned in connection with this subject.[1] A clerk in a brewery lent money to the partners of the house, and two of them signed an acknowledgment for the sum lent, and agreed to pay interest for it. Various changes took place in the house, in the course of which one of the partners who signed the acknowledgment retired from it. The interest was paid from time to time, by the different firms till the last became bankrupt. The clerk continued to serve all the different firms, and was cognizant of the different changes. It was held, notwithstanding, that he might recover the

[1] Blew v. Wyatt, 5 Car. & P. 397.

money he had advanced, from the two persons who signed the acknowledgment.

Where the creditor continues dealing with the new firm—David v. Ellice.

SEC. 562. Thirdly, where there is an account current between a firm and a creditor, and upon the retirement of a partner the creditor continues his dealings with the house, this is not necessarily an adoption by the creditor of the new firm as his sole debtors,[1] although a balance has been struck, and a new account opened with the new firm, and the creditor has drawn upon the new firm, on the footing of such account. In David v. Ellice,[2] not only did these circumstances occur, but there was strong evidence to show that the creditor expressly adopted the new firm as his sole debtors, and yet the Court of King's Bench held that such an adoption, especially as it appeared that the new firm consisted merely of the remaining partners, could not be presumed, but must be expressly proved. The principles, however, upon which that case was decided, have, as we shall see presently, been much questioned, if not overruled, in succeeding cases. The facts were these: The plaintiff was a merchant residing in Canada. The defendants, with John Inglis, deceased, were merchants and partners in London, under the firm of Inglis, Ellice & Co. The plaintiff had had various dealings with that firm prior to the 30th April, 1821. On that day, the defendant, Ellice, retired from the firm, and a circular letter was sent to the plaintiff, giving notice of that event, and stating that the business would be continued as before by the remaining partners, "who assume the funds and charge themselves with the liquidation of the debts of the partnership." The plaintiff answered, "I am favored with yours of the 10th ult., with circular of the 30th April, advising the change in your firm, which continues to have my full confidence. The accounts will be transferred so soon as I receive my account current, and an account opened for the new firm." Inglis, Ellice & Co., having been in the habit of making up their Canada accounts to the 30th June, annually, their account current with the plaintiff was made up to the 30th June, 1821, and not to the preceding 30th April (the time of Ellice's retirement). This account was transmitted to the plaintiff, at Montreal, by the new firm of Inglis & Co., and the plaintiff, in answer, wrote as follows: "The account current with your late firm is received, and, with the exception of the outstanding debts of 1804, is perfectly correct, and have

[1] See Ex parte Appleby, 2 Dea. 482. [2] 5 Barn. & Cres. 196; 7 Dowl. & Ryl. 690.

transferred in a new account with your present firm, whose confidence I hope I shall continue to merit." On the 3d November, 1821, the plaintiff drew a bill for 5,000*l.* on the new firm. In July, 1822, the new firm of Inglis & Co. made up and sent to the plaintiff the first account in their own names. In August, 1822, John Inglis died, and thereupon Inglis & Co. suspended their payments; and, in May, 1823, a commission of bankrupt issued against the defendants, under which they were declared bankrupts, and obtained their certificates. The plaintiff having brought his action for money lent, against the bankrupts and Ellice, obtained a verdict against the defendant Ellice, for 13,162*l.* 5*s.* 8*d.*, the other defendants having pleaded their bankruptcy. The sum for which the verdict passed was the balance due upon the account of the 30th June, 1821, after giving credit for all the payments made by the new firm of Inglis & Co. to the plaintiff, or on his account, without taking credit for any payments made by the plaintiff to the new firm.

The case coming to be considered before the Court of King's Bench upon an application for a new trial, that court were of opinion that the verdict was properly taken for the plaintiff, and refused the application. The judgment of the court, which was delivered by Abbott, C. J., appears to have proceeded upon these considerations: First, that no benefit to the plaintiff could be presumed from his adopting the change in the heading of the accounts, and drawing a bill on the new firm for part of the debt, though the bill was duly paid; and, secondly, that it could not be presumed from the facts that Ellice had sustained prejudice by leaving funds in the hands of his partners which otherwise he could have withdrawn. That, under these circumstances, no transfer of the debt could be presumed.

Lodge v. Dicas.

SEC. 563. The principles upon which this judgment was founded had, to a certain extent, been acted upon in the previous case of Lodge v. Dicas.[1] That was an action of assumpsit for work and labor, etc., against two persons who had been in partnership together as attorneys, at the time when the debt was contracted. Disputes having arisen between them, they agreed to dissolve their partnership, and it was arranged that Rondeau, one of the partners, should receive the partnership debts and discharge the plaintiffs' demand. The plaintiffs received notice of the arrangement by a letter from Rondeau, as

[1] 3 Barn. & Ald. 611.

follows: "We have been arranging our accounts, and Mr. Dicas and myself have agreed that I should take the amount of your account on myself, which I will be responsible for to you." Upon receiving this letter, the plaintiffs expressly agreed to exonerate Dicas from all liability as to the partnership account, and stated that they should charge it to Rondeau's private account, he having continued to employ them as his agents. The plaintiffs, notwithstanding this agreement, obtained a verdict, and the Court of King's Bench refused to grant a new trial, Holroyd, J., observing that the arrangement between the partners would not deprive the plaintiffs of their original right of action, unless it amounted to a satisfaction, that, in this case, the plaintiffs gained no fresh security by having Rondeau as their debtor, and unless it could have been shown that they were parties to the agreement between Dicas and Rondeau, there was no consideration whatever for the promise proved to have been made.

Lodge v. Dicas and David v. Ellice, overruled by Thompson v. Percival, Kirwan v. Kirwan, and Hart v. Alexander.

SEC. 564. But the two last-mentioned cases, or at least the principles on which they were founded, have been greatly shaken, if not overruled, by more recent decisions, in which the courts distinctly recognized the principle, not only that the acceptance of the security of one partner may be a good consideration for the discharge of the security of two, but also, that the transfer of an account from one firm to another without any fresh security being given to the creditor by the new firm, may, combined with other circumstances showing an acquiescence on the part of the creditor in the change of his debtor, amount to a discharge of the old firm or retiring partner.

Thompson v. Percival.

SEC. 565. In Thompson v. Percival,[2] Denman, C. J., in adverting to the latter point, said that in his opinion, and that of his learned brothers, there was in David v. Ellice, abundant evidence to go to a

[1] But where an action was brought to recover from A & B the sum of 25*l.*, which had been placed in their hands by the plaintiff as a security for the faithful discharge of his duty to them as their servant, and the plea alleged an agreement between A & B, upon dissolution of the partnership, that A should undertake certain debts and retain certain servants, and B should undertake certain other debts and retain certain other servants, and, in pursuance of this agreement, A took upon himself to pay the 25*l.* to the plaintiff, and retained him in his sole employ, and that the plaintiff had notice of this and assented to such agreement and retainer by A, and in consideration thereof, discharged B from his promise as to the 25*l.*, it was held that the plea did not state an adequate consideration for the alteration of the plaintiff's security. Thomas v. Shillibeer, 1 M. & W. 124.

[2] 5 Brad. 925.

jury (and upon which the court might have decided), of the payment of the old debt by Inglis, Ellice & Co., to the plaintiff, and a new loan to the new firm, which might have been as well effected by a transfer of accounts by mutual consent as by actual payment of money.

Kirwan v. Kirwan.

SEC. 566. In the case of Kirwan v. Kirwan,[1] which followed that of Thompson v. Percival, the court were of opinion, though with some expressions of doubt on the part of one of the judges, that there was no sufficient evidence of an agreement by the creditor to accept the responsibility of the new firm in the place of the old firm, but the court were all agreed that if such an agreement had been made out, it would have been sufficient to discharge the old firm, notwithstanding no valuable consideration for it were expressly proved. In that case Clement, Matthew and Nicholas Kirwan succeeded to their father's business, which they carried on under the firm of John Kirwan & Sons, and their brother Anthony was their creditor to the extent of 12,000*l*., for which they allowed him interest, he drawing upon them as his occasions required. Changes took place in the partnership by the retirement, first of Clement, and then of Matthew, and, lastly, by the introduction of Kelly as a new partner with Nicholas; but throughout the whole of these changes the business was conducted in the same style or firm. After the retirement of Clement and Matthew, notices were given of those events in the same Gazette, and in the notice of Clement's retirement it was stated that he left Matthew and Nicholas "to carry on the business and liquidate the concerns of the present partnership." During the successive partnerships until the death of Anthony Kirwan, which took place nearly three years after the accession of Kelly to the firm, annual accounts were rendered to him, in each of which he was credited with the balance appearing due to him from the statement of accounts for the respective preceding years; and after his death similar accounts were rendered to the plaintiff, who was his widow and administratrix. Upon the accession of Kelly, there being a new capital brought into the concern, the account of Anthony Kirwan was carried from the books of the old to that of the new partnership, but the balance was struck annually as before. It did not appear that Anthony Kirwan ever saw the Gazette, or that he or Kelly ever expressly agreed that his debt should be transferred from Clement to Matthew and Nicholas, or to

[1] 2 Cromp. & Mees. 617.

Nicholas and Kelly. The following letter, however, from the intestate to Clement Kirwan, dated after the dissolution, was given in evidence: "Dear Brother — I received your letter yesterday. I was very well aware that on your dissolving partnership with Mr. Nich. I had no further claim upon you." Under these circumstances, an action having been brought by the widow of the intestate against Clement, Matthew and Nicholas to recover the balance due, the question was, whether Clement or Matthew were discharged from their original responsibility, and the Court of Exchequer, on the ground that there was not sufficient evidence of an agreement to shift the responsibility, held that they were not discharged; but Lord Lyndhurst, in the course of the argument, seemed to assent to the proposition, that a good consideration may be presumed, for accepting the security of the remaining partners in lieu of that of the original firm. And Parke, B., in delivering his judgment, adhered to the doctrine laid down in Thompson v. Percival.

Hart v. Alexander.

SEC. 567. But, in connection with this subject, the strongest case in favor of the retiring partner is that of Hart v. Alexander,[1] in which the law laid down in the previous cases of Thompson v. Percival and Kirwan v. Kirwan does not seem to have been questioned by any of the learned judges, though considerable difference of opinion existed among them as to the weight of the evidence which had been offered to show that the creditor knew of the retirement of one of the partners in the house of which he was a creditor, and had adopted the responsibility of another party in lieu of that of the retiring partner. The action was brought for money lent, and the plaintiff sought to charge the defendant as a partner in the house of Alexander & Co. under the following circumstances. The plaintiff, who was in the East India Company's military service, kept a banking account with the house of Messrs. Alexander & Co. at Calcutta, between the years 1815 and 1832. The rate of interest allowed to the plaintiff varied at different periods, ranging between the rate of 10*l.* and 5*l.* per cent. In 1822, and the two following years, it was 6*l.* per cent; in 1825 it was reduced to 5*l.*. The plaintiff's balance uniformly increased, and in April, 1832, it amounted to 18,150*l.*, the sum for which the action was brought. In 1822 the defendant, who was a partner in the house, retired, and Nathaniel Alexander was admitted

[1] 2 Mees. & Wels. 483.

a partner in his room. In December, 1832, the then partners became bankrupt.

In defense of the action the following evidence was submitted to the jury: The defendant came from India to England in 1818, having previously executed a deed by which he was to cease to be a partner in May, 1822, at the latest, and Nathaniel Alexander was to be admitted on his retirement. On the 6th May, 1822, the dissolution of the firm by the defendant's retirement, and the formation of the new partnership, were announced in the Calcutta Gazette. In the same year the defendant became a candidate for the office of a director of the East India Company, and inserted thirteen times in the newspapers an address to the proprietors of East India stock, soliciting their suffrages, and stating that all his connection with mercantile concerns in India had ceased, and in 1823, he was elected a director. At this period the plaintiff (who had returned to England some time before, but at what precise time did not appear), was resident at Hythe, in Kent, and was a subscriber to a reading-room there, at which two of the newspapers, in which the advertisements appeared, were taken in. The plaintiff continued to receive his accounts-current yearly, through the house of Fletcher, Alexander & Co., of London, the agents of the Indian house, until the year 1831, the respective rates of interest charged in each year being stated in such accounts. In October, 1831, the plaintiff, as one of the executors of a brother of his who had died in Persia, executed at the office of Fletcher, Alexander & Co. a power of attorney to Messrs. Young, Bracken, Ballard, Sutherland and Alexander, who then constituted the firm of Alexander & Co., to get in the property of the testator in India, which power expressly named the partners, and described them as members of the house of Alexander & Co. And, in May, 1833, the plaintiff executed another power of attorney to Mr. Fullarton, a former partner in the house of Alexander & Co., together with the members of the firm of Bagshaw & Co. in Calcutta, "to receive of, and from James Young, Thomas Bracken, George Ballard, J. C. C. Sutherland, and Nathaniel Alexander, all of Calcutta, merchants and agents, then or lately carrying on business in copartnership, under the firm of Alexander & Co.," all dividends, principal and interest, etc., etc., due to him, the plaintiff, on the balance of any account-current, etc., and to vote in the choice of assignees, and prove under the estate of any bankrupts or insolvents indebted to him.

Upon this evidence the jury found a verdict for the defendant,

Lord Abinger, C. B., by whom the action was tried, having observed strongly on the foregoing circumstances as leading to the conclusion that the plaintiff knew of the defendant's retirement, and his Lordship told the jury, that if the plaintiff, with knowledge of that fact, went on trading with the firm and entering into new contracts, by taking new rates of interest or otherwise, he thereby acquitted the retiring partner and consented to take the remaining partners for his debtors, and that such was the case even though no new partner came in on the retirement of the old one.

The plaintiff then moved for a new trial, but the Court of Exchequer refused the rule, two judges being of the opinion that there was strong evidence, and a third that there was evidence to go to the jury, of the plaintiff's knowledge of the defendant's retirement. These opinions were founded principally on the circumstances under which the plaintiff had executed the powers of attorney, especially the power of attorney to Mr. Fullarton. And Parke, B., who, with Lord Abinger, thought the evidence strongly in favor of the retired partner, said that he was not only not dissatisfied with the verdict, but he thought that if, in David v. Ellice, and Kirwan v. Kirwan, the question had been left to the jury instead of being determined by the court, they would have drawn the same conclusion as in the present case. "I apprehend," said his Lordship, "the law to be now settled, that if one partner goes out of a firm, and another comes in, the debts of the old firm may, by the consent of all the three parties — the creditor, the old firm, and the new firm,— be transferred to the new firm. In David v. Ellice, the retired partner was held liable, but the court was substituted for a jury in that case, and I much doubt whether twelve merchants would have determined it as the court did."

In case of moneys borrowed of a trustee who is a partner — Dickenson v. Lockyer.

SEC. 568. If a firm borrow trust-moneys of which one of the partners is a trustee, a retiring partner will not be exempt from liability in respect to trust-moneys, unless he have given a consideration to, or received a release from, the *cestui que trust*, or his agent. In the case of Dickenson v. Lockyer, [1] it appeared that Lockyer was trustee under the will of Furze, and was a partner with Bence and Woodward. The partnership was indebted to the testator's estate in certain sums secured by two bonds. The executrix went to America, and left the

[1] 4 Ves. 36; 1 Hov. Supp. 428.

bonds with Lockyer. The partnership was afterward dissolved by the retirement of Bence, Lockyer and Woodward undertaking to take the stock, and to pay all the debts. Upon that occasion the creditors were convened, and their accounts were adjusted by their consenting to take bonds of Lockyer and Woodward, and giving up the bonds and securities of Bence, Lockyer, and Woodward, and Lockyer, without any communication with the family of Furze, delivered up the two bonds which were left in his possession to Bence, to be canceled, but no new security was taken in their place. At the time of the dissolution the partnership was solvent, and so was Lockyer in his private capacity. After the dissolution the interest, as it accrued due upon the two bonds, was remitted to Herodia Furze by Lockyer, out of the funds of Lockyer & Woodward. About seven years after Bence left the firm Lockyer & Woodward became bankrupts. A bill was then filed by the administrator *de bonis non* of the testator, and the testator's children, against the bankrupts and Bence, praying that an account might be taken of what was due on the two bonds, and that Bence might pay what should be found due. Lord Loughborough: "Bence, being jointly bound with Lockyer and Woodward, agrees with them that they shall pay this debt, and relieves himself, and, upon that consideration, he gives them his share of the fund with which this debt was to be paid. That can never be made a payment. The question in this court is, whether the trustee of a bond can, without the *cestui que trust*, release the obligor. Now, Bence is debtor with the two others under the bond, and they cannot, by management among themselves, destroy that security. There was no real payment of money into the hands of Lockyer as money belonging to the estate of Furze, to be laid out according to the will, but the three co-obligors, by a transaction between themselves, agree, that one shall be discharged, and the whole security rest upon the two without the privity of the executor. But no act of Bence can affect those claiming under Furze, for Lockyer was the proper hand to pay. It is not necessary to inquire what would have been the case, if actual payment had been made, and the money was in the hands of Lockyer. It would have depended a good deal upon the authority given by the executrix to him to act. If the two others had actually paid their shares of the bond into the hands of Lockyer, perhaps with all the evidence of the confidence reposed in Lockyer, and his being trustee in the will, it would be very difficult for the court to make them answerable, but what they have done is nothing like that. By the

agreement with him they have reduced the security of the trust from the bond of the three to the personal security of the two. All the consideration was personal to Bence and Lockyer, not in the least affecting the estate. Therefore the representatives of Bence must account. Let an account be taken of what is due upon the two bonds, the plaintiffs to be at liberty to prove the debt under the commission. I will not give costs. It is a very hard case. They all meant well, and if he had asked for an authority, I have no doubt he would have had it."

It is observable that Lord Loughborough in this judgment relies in a great measure on the circumstance that there was no specific repayment by Bence to Lockyer of his share of the bond debts in question, but only a general assignment of his interest in the partnership effects. The same point is touched upon by Lord Kenyon, in a case of a similar nature.[1] There A and B were partners, and A was an assignee of C, a bankrupt. A, with the privity of B, applied the money which he received as assignee to partnership uses. B retired, both partners being solvent, B assigning to A all the partnership effects and credits, A undertaking all the debts. Lord Kenyon said it was not to be denied that the money was never paid to C's estate; it was said, however, that it was paid by the defendant B assigning over to the other defendant A the unliquidated fragments of the partnership effects, the stock in trade, and the outstanding debts, but that was not such a payment to C's assignees as would exonerate the defendants, and therefore B, as well as A, was liable.

Notwithstanding the last of these cases, it may reasonably be concluded, that where a firm has borrowed trust-moneys of one partner, a retiring partner, upon payment of his share of the debt, may, under certain circumstances, be exempted from responsibility on that account. But this, as Lord Loughborough observed, must depend on the authority given to the trustee, and the degree of confidence reposed in him. Partners, therefore, in borrowing trust-money of their copartner, ought to see that he has authority to lend and power to release.

Retirement of a partner with knowledge of firm's insolvency—Parker v. Ramsbottom.

SEC. 569. In concluding this section, we ought to notice a very important question connected with the retiring partners, namely,

[1] Smith v. Jameson, 5 T. R. 601.

how far they are at liberty to retire from the firm with the knowledge of the firm's insolvency. Upon the whole, it seems clear that if a partner, by right of the articles, or by permission of his copartners, retire from the firm on the very ground of its insolvency, this act *per se* is not fraudulent, and cannot render him liable to the creditors of the remaining firm, though, of course, it will be otherwise if his retirement arise from or be connected with some fraudulent agreement between himself and the remaining partners.

In the case of Parker v. Ramsbottom,[1] Parker retired from the firm, having drawn out a portion of his capital, under an agreement that the rest should be paid to him by installments, with interest. At the time of his retirement he knew of the firm's insolvency, and this objection was made by the counsel for the assignees of the bankrupt partners. It is clear, however, that there was no fraud in the transaction; and the judges, without adverting to the objection, permitted Parker to prove against the estate of the bankrupts. So, in a case before Sir Thomas Plumer, his Honor held clearly that a retiring partner might receive a sum of money for his share in the concern, although both knew that the partnership was insolvent. "Might not," he said, "one partner dissolve publicly his partnership with the other, he knowing the then state of it, but having a better opinion of it, or choosing, for his own advantage, to give a sum of money if the other would convey his interest to him? They certainly might make such an agreement, no fraud being practiced or intended. The mere circumstance of the partnership being, at the time of the retirement, in such a state that their joint effects were not sufficient to pay their joint debts, would not, *per se*, be sufficient to invalidate a dissolution of partnership made fairly between the partners themselves. In this case there was no contrivance between the bankrupt and the retiring partner to put their joint effects into a state to benefit the latter."[2]

When the purpose is to defraud the creditors—Anderson v. Maltby.

SEC. 570. But if two copartners enter into a contract for the pur-

[1] 3 Barn. & Cres. 257; 5 Dowl. & Ryl. 138.

[2] Ex parte Peake, 1 Madd. 346; and see Ex parte Carpenter, Mont. & M'A. 1. And it may be remarked that it is very questionable whether an action will lie against a man for representing, contrary to the truth, that a partnership in which he is engaged is solvent. In a late case, the Court of Common Pleas avoided the decision of that point, but held that, at all events, to support such an action, the representation must be in writing; for, although it be made by a party as to the credit and circumstances of a firm, of which he himself is a member, it is also a representation as to the credit of "another person" within the meaning of the stat. 9 Geo. 4, c. 14, s. 6. Devaux v. Steinkeller, 1 Scott, N. R. 202.

pose of defrauding their joint creditors, the one agreeing to permit, the other to withdraw money out of the reach of the joint creditors, such a contract is fraudulent and invalid, and upon this principle, as Sir Thomas Plumer observed, the case of Anderson v. Maltby[1] was decided. The facts of that case were as follows: Brough Maltby, Thomas Maltby, and Dyer, were in partnership, the share of Thomas in the capital being 6,200*l.* In June, 1774, Dyer retired. A new partnership was then formed between Brough Maltby, Thomas Maltby, and George Maltby, under the firm of Brough Maltby & Sons. No articles of partnership were entered into, and the books used in the partnership of Maltby & Dyer, and Maltby, Dyer & Maltby, were carried on in the new copartnership, without any entry denoting its commencement. At the time of forming this new partnership, no additional capital was brought in by either of the parties, but Thomas Maltby had credit given to him, under the title of "Thomas Maltby's capital," for the sum of 6,200*l.*, being what he had advanced to the partnership of Maltby & Dyer. The new partnership of Brough Maltby & Sons continued until April 1784, when Thomas Maltby, finding the partnership in an insolvent state, retired from the concern, but no public notice was given of the dissolution of the partnership, nor any deed of dissolution executed; nor was any settlement made in the books, nor any valuation of the outstanding debts, but the books were continued without alteration, until the 10th July, 1786. On that day the settlement of Thomas' capital, which had been made up on the 1st July, 1784, was for the first time entered in the partnership books, and Brough Maltby and George Maltby remained in trade until the 6th May, 1788, when they stopped payment; and on the 3d of November, 1788, they became bankrupts, and the plaintiffs were chosen assignees. During the time the partnership of Brough Maltby & Sons continued, Thomas Maltby drew out of the copartnership the sum of 3,904*l.*, 15*s.* 1*d.*; and after he had retired he received from the remaining partners on the footing of the account of the 1st July, 1784, the sum of 9,467*l.* 14*s.* 2*d.*; he likewise claimed as a creditor under the commission the sum of 3,628*l.* 11*s.*

Under these circumstances, the assignees of Brough Maltby and George Maltby filed their bill against Thomas, praying an account of all sums of money, securities, and bills, paid to or deposited with the defendant by the partners and received by him during the subsistence of the partnership and since, and an account of his

[1] 4 Bro. 423; 2 Ves. Jr. 244.

share at the time he retired; that the payments made to him should be declared fraudulent; that he should be decreed to pay his proportion of the partnership debts; and if a surplus should remain after discharging the partnership debts, that the proof of the defendant's debts should be reduced to his share of that surplus.

Lord Loughborough in an elaborate judgment, after entering minutely into every particular of the case, in order to show that a fraudulent collusion existed between the partners, observed in conclusion: "The case resolves itself into a plain question, whether in 1784, upon the 1st of July, the defendant was *bona fide* a creditor of the other two, then about to enter into a new partnership. If not, if all this transaction is to be void, under the color in which it presents itself to me, it is an imposition, not upon the other partners only, because they were consenting, but upon the creditors who must deal with the partnership of the two, *contrived upon a certain foresight of bankruptcy* at no very remote period (though the exact time was not certain), and managed between persons of the same family, by which the creditors of the two have been losers exactly to the amount of what he has received. The only doubt I have is, whether I should better attain the justice of the case by directing an account of all transactions between Brough and George Maltby, from the commencement of their partnership, for it can go no farther back, and the defendant, with an inquiry into the state of accounts at that period between them, to see whether there was any consideration whatever upon which he could be a creditor, for if it was all moonshine, and there was no property upon which any account could be made out, it is all an imposition to create a false credit to themselves and to give him the name of a creditor, when in fact he was none, and a mere device to draw the money of other people from the new copartnership into his pocket. Whether this should be done in the Master's office, or by discussion of an issue at law, is a point upon which I doubt. Consider which will best attain justice." His Lordship ultimately directed an account, declaring his opinion, that the settlement of the defendant's capital in the partnership of Brough Maltby & Sons, at the time of the dissolution thereof, which the defendant admitted by his answer, was made up soon after he quitted the partnership, but was not entered in the partnership books till the 10th July, 1786, was not binding upon the plaintiffs, the assignees of the bankrupts, and that the defendant, Thomas Maltby, could only be considered as a creditor of the bankrupts in respect of the effective balance of the stock of

the former partnership, at the time of the dissolution thereof, transferred to the new partnership.

Termination of liability in ordinary partnerships.

SEC. 571. Before examining the circumstances which put an end to a partner's liability to creditors of the firm," says Mr. Lindley,[1] "it is necessary to draw attention to the distinction between a partner's liability for what may be done after his copartners have ceased to be his agents, from his liability for what may have been done whilst their agency continued. It is obvious that there may be many circumstances which have no effect upon a liability already accrued, but which, nevertheless, may prevent any liability for what is not yet done from arising, and in order to determine with accuracy the events which put an end to a partner's liability to creditors, it is necessary to distinguish his liability for the future from his liability for the past.

Termination of liability as to future acts.

SEC. 572. The agency of each partner in an ordinary firm, and his consequent power to bind the firm, *i. e.*, himself and his copartners, may at any time during the continuance of the partnership be determined by notice,[2] for his power to act for the firm is not a right attaching to him as partner independently of the will of his copartners, and although any stipulations amongst the partners themselves will not affect non-partners who have not notice of them, yet, if any person has notice that one member of the firm is not authorized to act for it, that person cannot hold the firm liable for any thing done in the teeth of such notice.[3]

With one or two exceptions which will be mentioned presently, the agency of each partner and his consequent power to bind his copartners can only be effectually determined by giving notice of its revocation. The authority imputed to each partner must continue until some event happens to put an end to it, and this event ought to be as notorious as that which conferred the authority upon him. The same reason which leads to the imputation of the power to act for the firm at all demands that such power shall be imputed so long as it can be exercised and is not known to have been determined.

To this principle there are exceptions which may be conveniently disposed of before the principle itself and its application are discussed.

---

[1] Lindley on Partnership, pp. 324–370, given entire in the following pages.

[2] See Vice v. Fleming, 1 Y. & J. 227; Willis v. Dyson, 1 Stark. 164; Rooth v. Quin, 7 Price, 193; Galway v. Mathew, 1 Camp. 402, and 10 East, 264.

[3] This subject has been already discussed.

1. When a partner dies. Notice of death is not requisite to prevent liability from attaching to the estate of a deceased partner in respect of what may be done by his copartners after his decease.[1] For, by the law of England, the authority of an agent is determined by the death of his principal, whether the fact of death is known or not.[2]

The death of one partner does not, however, determine an authority given by the firm through him before his death, and consequently, if after his death such an authority is acted on, the surviving partners will be liable for it. In Usher v. Dauncey,[3] bills were drawn and indorsed in blank by a partner in the name of the firm, and were given by him to a clerk to be filled up and negotiated as occasion might require. The partner in question died, and after his death, and after the name of the firm had been altered, one of the bills was filled up and negotiated. Lord Ellenborough held that the bill was binding on the surviving partners, considering that the power to fill up the bill emanated from the partnership and not from the individual partner who had died.

Moreover, it does not follow that because a creditor has no remedy against the estate of a deceased partner in respect of debts contracted by his copartners since his death, his estate is not liable to contribute to such debts at the suit of the surviving partners. That is a different matter altogether, and depends on the agreement into which he entered with his copartners, as will be seen hereafter when the subject of winding up is under consideration.

Effect of bankruptcy on powers of partners.

SEC. 573. When a firm becomes bankrupt, the authority of each member to act for the firm at once determines. If one partner only becomes bankrupt, his authority is at an end, and his estate cannot be made liable for the subsequent acts of his solvent copartners. At the same time, if notwithstanding the bankruptcy of one partner the others hold themselves out as still in partnership with him, they will be liable for his acts, as if he and they were partners,[5] and although

[1] Devaynes v. Noble, Houlton's case, 1 Mer. 616; Johnes' case, id. 619; Brice's case, id. 620; Webster v. Webster, 3 Swanst. 490. See Vulliamy v. Noble, 3 Mer. 614; Brown v. Gordon, 16 Beav. 302, as to the power of the surviving partners, who are the executors of the deceased partner, to bind his estate.

[2] See Blades v. Free, 9 B. & C. 167; Smout v. Ilbery, 10 M. & W. 1; Campanari v. Woodburn, 15 C. B. 400.

[3] 4 Camp. 97.

[4] For instances where the estate of a deceased partner has been held liable to contribute to debts incurred since his decease, see Blakesley's Executors' case, 3 Mc. & G. 726; Hamer's Devisees' case, 2 De G. M. & G. 366.

[5] See Lacy v. Woolcott, 2 Dowl. & Ryl. 458.

the estate of a bankrupt partner does not incur liability for the acts of the other partners done since the bankruptcy, yet the solvent partners have power to bring the partnership transactions to an end, and to dispose of the partnership property. This subject will be examined hereafter in the chapter on Bankruptcy, to which the reader is therefore referred.[1]

Retirement of dormant partner.

SEC. 574. Another exception, but one which only proves the rule, is that if a dormant partner (*i. e.*, one not known to be a partner[2]) retires, the authority of his late partners to bind him ceases on his retirement, although no notice of it be given. But this is because he never was known to be a partner at all, and the reason for the general rule has therefore no application to his case. The following decisions illustrate this exception: In Carter v. Whalley,[3] the defendant, Saunders, was a partner in the "Plas Madoc Colliery Co.," but there was nothing to show that the plaintiff or the public ever knew that such was the case. Saunders withdrew from the company, but no notice of his withdrawal was given either to the plaintiff or to the public. After his withdrawal the company became indebted to the plaintiff, and it was held that Saunders was not liable for the debt, upon the ground that the name of the company gave no information as to the parties composing it, and Saunders himself was not known either to the plaintiff or to the public to have belonged to the company before he withdrew.

Rule in Heath v. Sansom.

SEC. 575. In Heath v. Sansom,[4] the defendants, Sansom and Evans, carried on business as partners under the style of Philip Sansom & Co., but Evans was not known to be a partner. They dissolved partnership by mutual agreement, but did not notify the fact. After the dissolution, Sansom gave the plaintiff a promissory note on which he sued Sansom and Evans. The court decided that Evans was not liable, for, when his right to share profits ceased, he could not be held responsible for the subsequent acts of his copartner, unless he authorized those acts or held himself out as still connected with him, and he had done neither.[5]

---

[1] See Fox v. Hanbury, Cowp. 445; Morgan v. Marquis, 9 Ex. 145.

[2] A dormant partner known to a few persons to be a partner, is not dormant as to them, see Farrar v. Deflime, 1 Car. & K. 580; Carter v. Whalley, 1 B. & Ad. 14; Evans v. Drummond, 4 Esp. 89.

[3] 1 B. & Ad. 11.

[4] 4 B. & Ad. 172.

[5] See, too, Evans v. Drummond, 4 Esp. 89. This doctrine seems not to apply to Scotland. See Hay v. Mair, 8 Ross' L. C. on Com. Law, 639. The recent case of The Western Bank of Scotland v. Nee-

With the three exceptions which have been noticed, the general proposition above stated holds good. Thus, if a partner becomes lunatic, and his lunacy is not apparent or made known, his power to bind the firm and his liability for the acts of his copartners[1] will remain unaffected.

Dissolution and notice — effect of.

SEC. 576. So, if a partnership is dissolved, or one of the known members retires from the firm, until the dissolution or retirement is duly notified, the power of each to bind the rest remains in full force, although as between the partners themselves a dissolution or a retirement is a revocation of the authority of each to act for the others.[2] Thus, if a known partner retires and no notice is given, he will be liable to be sued in respect of a promissory note made since his retirement by his late partner, even though the plaintiff had no dealings with the firm before the making of the note.[3] And in determining which was first in point of time, viz., notice of the dissolution or the making of the note, effect must be given to the presumption that the instrument was made and issued on the day it bore date, unless some reason to the contrary can be shown.[4] In a modern case a firm was dissolved on the 29th December, 1837, and a bill dated the 2d February, 1838, was drawn and indorsed by one partner in the name of the late firm, but when he indorsed it did not exactly appear. Notice of dissolution was given by advertisement in the "Gazette" on the 20th March, 1838. It was held that in the absence of evidence to the contrary, the bill must be taken to have been drawn on the day it bore date, and that the time of its indorsement was a matter to be inferred by the jury from all the circumstances of the case. The jury found that it was indorsed before the 20th March, 1838, and the holder of the bill was consequently held entitled to a verdict against all the members of the dissolved firm.[5]

---

dell, 1 Fos. & Fin. 461, seems at first sight opposed to the authorities in the text, but it is conceived that in that case there must have been evidence to show that the defendant was known to have been a partner to the plaintiff before he retired.

[1] See Molton v. Camroux, 2 Ex. 487, and 4 id. 17, and Baxter v. The Earl of Portsmouth, 5 B. & C. 170, E. C. L. R. 11, and the cases cited.

[2] See Mulford v. Griffin, 1 Fos. & Fin. 145; Faldo v. Griffin, id. 147, and the cases in the next note.

[3] See Parkin v. Carruthers, 3 Esp. 248; Williams v. Keats, 2 Stark. 290, E. C. L. R. 3; Brown v. Leonard, 2 Chitty, 120; Dolman v. Orchard, 2 C. & P. 104, in which three last cases, however, there was a continual holding out. See as to ordering such a bill to be delivered up, Ryan v. Mackmath, 3 Bro. C. C. 15.

[4] See Anderson v. Weston, 6 Bing. N. C. 296.

[5] See Anderson v. Weston, 6 Bing. N. C. 296.

When notice is not given.

SEC. 577. So a partner who retires and does not give sufficient notice is liable to be sued for torts committed subsequently to his retirement by his late copartners or their agents.[1]

Moreover, if a dormant partner is known to certain individuals to have been a partner, he is as to them no longer in the situation of a dormant partner, and must, therefore, give them notice of his retirement if he would free himself from liability in respect of the future transactions between them and his late partners.[2]

It is obvious, therefore, that on the dissolution of a firm or the retirement of a partner, it is of the greatest importance to notify the fact, and each partner has a right to notify it. If his copartners prevent him from exercising that right, a court of equity will, if possible, aid him and compel them to do what may be necessary to enable notice to be given. In Troughton v. Hunter,[3] a partnership was dissolved by a decree of the court. It appeared that no advertisement of the dissolution would be inserted in the "Gazette" unless signed by both partners. The defendant, who, it seems, would not sign the advertisement, was ordered so to do by the court.

Effect of notice of dissolution.

SEC. 578. Subject to two exceptions, which will be examined hereafter, notice of dissolution of a firm or the retirement of a partner duly given, determines the power previously possessed by each partner to bind the others. Hence, after the dissolution of a firm or the retirement of a member and notification of the fact, no member of the previously existing firm is, by virtue of his connection therewith, liable for goods supplied to any of his late partners subsequently to the notification,[4] nor is he liable on bills or notes subsequently drawn, accepted, or indorsed by any of them in the name of the late firm,[5] even although they may have been dated before the dissolution,[6] or have been given for a debt previously owing from the firm[7] by the partner expressly authorized to get in and discharge its debts.[8]

---

[1] Stables v. Eley, 1 Car. & P. 614.

[2] Farrar v. Deflime, 1 Car. & K. 580; see, too, Evans v. Drummond, 4 Esp. 89, and Carter v. Whalley, 1 B. & Ad. 14.

[3] 18 Beav. 470.

[4] Minnitt v. Whinery, 5 Bro. (P. C.) 489.

[5] Paterson v. Zachariah, 1 Stark. 375; Abel v. Sutton, 3 Esp. 108; Spenceley v. Greenwood, 1 Fos. & Fin. 297.

[6] Wrightson v. Pullan, 1 Stark. 375; S. C., Wright v. Pulham, 2 Chitty, 121.

[7] Kilgour v. Finlyson, 1 H. Blacks. 156; Dolman v. Orchard, 2 Car. & P. 104.

[8] Kilgour v. Finlyson, 1 H. Blacks. 156; see Lewis v. Reilly, 1 Q. B. 349.

Instances where notice does not protect from liability.

SEC. 579. There are, it is true, cases to be met with in which, notwithstanding a dissolution and notice, a bill or note in the name of the firm has been held to bind those who were members thereof, prior to the dissolution, but in each of these cases there was some circumstance taking it out of the ordinary rule. In Burton v. Issitt,[1] the continuing partner had authority to use the name of the retired partner in the prosecution of all suits for the recovery of partnership property. This was held to authorize the giving of a promissory note for sixpences, payable under the Lords' Act, and the retired partner was therefore held bound by a note given by his late partner in payment of those sixpences. In Smith v. Winter,[2] the continuing partner had express permission to use the name of his late partner, who was, therefore, justly held liable on a bill given in the name of the old firm after his retirement. The only case, indeed, of this description, which presents any difficulty, is Lewis v. Reilly.[3] There two partners drew a bill payable to their own order, and afterward dissolved partnership. One of them then indorsed the bill in the name of both to the plaintiff, who knew of the dissolution. It was held, in an action by him against both partners, that he was entitled to recover on the bill, and that it was immaterial whether he knew of the dissolution or not. The precise ground of this decision does not distinctly appear. The court seems to have proceeded on the supposition that an indorsement by one of several payees in the name of all is sufficient, but the writer has been unable to find any previous authority for such a doctrine, save where the indorsers are partners, which in the case in question they were not, as the plaintiff was found by the jury to have known. The case is certainly anomalous and requires reconsideration.[4]

The exceptions alluded to above as qualifying the rule that the agency of each partner is determined by dissolution (or retirement) and notice are —

First, where a partner, who has retired and notified his retirement, nevertheless continues to hold himself out as a partner, and secondly, where what is done only carries out what was begun before.

1. If a partner retires and gives notice of his retirement, and he nevertheless allows his name to be used as if he were still a partner,

[1] 5 B. & Ald. 267.
[2] 4 M. & W. 454.
[3] 1 Q. B. 349.
[4] See Story on Bills, § 197, and Abel v. Sutton, 3 Esp. 108.

he will continue to incur liability on the principle of holding out explained in the early part of this treatise. In Williams v. Keats,[1] after a partner had retired, and after notice thereof had been given by advertisement, a bill was accepted by his copartner in the names of himself and late partner. The names of both still remained painted up over their late place of business, and Lord Ellenborough held that the partner who had retired was liable on this bill notwithstanding the advertisement, for there was no evidence to show that the plaintiff in fact knew of the dissolution.[2] Upon this, however, it is to be observed that the only evidence that the retired partner authorized the continued use of his name, was the fact that he had not prevented it. Now, authorities are not wanting to show that if a partner retires, and notice of his retirement is given by advertisement, he will not continue to incur liability by the acts of his copartners, simply because they continue to carry on business in the old name, and he does not take steps to stop them.[3] His forbearance in this respect does not necessarily amount to an authority to use his name as before, and unless his name is used by his authority, he is not liable on the ground that he holds himself out as a partner.[4] But although it may be doubtful whether in Williams v. Keats there was a sufficient holding out, it is clear that if a partner retires and does still hold himself out as a partner, this is in fact signifying that he is willing to incur the responsibilities of a partner for the sake of those with whom his name is associated, and, therefore, he will continue to be answerable for their conduct, even to persons dealing with them with knowledge of his retirement. This was decided in Brown v. Leonard,[5] a case in which the plaintiff sued on a promissory note made in the name of Spring, Leonard, and Bush. Before the note was made Bush had retired from the firm, and the plaintiff, before he took the note, was told by Bush that he had ceased to be a partner with Leonard and Spring, but that his name was to continue for a certain time. Bush was held liable on the note, for, notwithstanding his retirement, his name was continued, and with it his responsibility.

The same principle was acted on in Stables v. Eley,[6] in which a

[1] 2 Stark. 290; see, too, Dolman v. Orchard, 2 Car. & P. 104; Emmet v. Bradley, 7 Taunt. 600.

[2] See, as to this, Brown v. Leonard, 2 Chitty.

[3] See Newsome v. Coles, 2 Camp. 617.

[4] As to a retiring partner's right to an injunction to restrain the continuing partners from carrying on business in the old name, see De Tastet v. Bordenave, Jac. 516; Webster v. Webster, 3 Swanst. 490, note; Lewis v. Langdon, 7 Sim. 421

[5] Brown v. Leonard, 2 Chitty, 120.

[6] 1 Car. & P. 614.

retired partner, whose name was still on a cart, and over the old place of business, was held liable for the negligence of the driver of the cart.

Rights of partners after dissolution — Lyons v. Haynes.

SEC. 580. It is said that a firm, notwithstanding its dissolution, continues to exist so far as may be necessary for the winding up of its business.[1] This doctrine requires consideration. No doubt after, as well as before dissolution, each partner can pay, or receive payment of, a partnership debt, for it is clearly settled that, at law, payment by one of several joint debtors, or to one of several joint creditors, extinguishes the debt irrespectively of any question of partnership. So, again, as regards dealing with the partnership assets, it has been frequently held that the power of a continuing or surviving partner to sell partnership goods is as extensive as that of a partner in a going concern.[2] But when questions of a different sort arise, considerable difficulty is experienced, and this difficulty is rather increased than diminished by the loose statement that a partnership which is dissolved is nevertheless deemed to continue so far as may be necessary for winding up its affairs.

Lyons v. Haynes[3] is a strong authority to show that when a company is dissolved by a resolution of a meeting competent to dissolve it, the power of a majority of shareholders to bind the minority is at an end, and that even as regards the mode of winding up the concerns of the defunct company, the majority of its shareholders cannot bind either a dissentient minority or absentees.

Other cases, which have been already referred to,[4] clearly show that after the dissolution of an ordinary partnership, no one aware of the dissolution is entitled on any ground of implied agency to hold the

[1] Ex parte Williams, 11 Ves. 5; Peacock v. Peacock, 16 id. 57; Crawshay v. Collins, 15 id. 227, and 2 Russ. 342; Wilson v. Greenwood, 1 Sw. 480; Crawshay v. Maule, id. 507; Butchart v. Dresser, 4 De G. M. & G. 542. N. B.—The *dicta* of Lord Eldon were not made in any case in which the power of one partner to bind the others after dissolution was before him for decision.

[2] See Fox v. Hanbury, Cowp. 445; Smith v. Stokes, 1 East, 363; Smith v. Oriell, id. 368; Harvey v. Crickett, 5 M. & S. 336; Morgan v. Marquis, 9 Ex. 145; Butchart v. Dresser, 4 De G. M. & G. 542. Whether this is the result of the doctrines of agency, or of the technical rule, that one tenant in common cannot maintain trover against another, is perhaps even yet scarcely settled. This subject will be noticed hereafter.

[3] 5 Man. & Gr. 504. The question in this case was whether an action would lie by a shareholder against directors for not applying the assets of the company as prescribed by a resolution made after the company had been dissolved. It was held that such action did not lie, although the directors had assumed to wind up the company under the authority of the resolution. See *ante*, 170 *n*–178 *n*.

[4] Kilgour v. Finlyson, 1 H. Blacks. 156, and Abel v. Sutton, 3 Esp. 108. See, too, Pinder v. Wilks, 5 Taunt. 611.

members of the late firm responsible for acts done by each other subsequently to the dissolution, and every one must feel the force of Lord Kenyon's observation in Abel v. Sutton, that if the contrary doctrine were to prevail a man could never know when he was to be at peace and freed from all the concerns of the partnership.

The doctrine now in question cannot, it is submitted, be carried further than this, viz., that notwithstanding dissolution, a partner has implied authority to bind the firm so far as may be necessary to settle and liquidate existing demands, and to complete transactions begun, but unfinished at the time of the dissolution.[1] Even Butchart v. Dresser,[2] which goes further than any other case, does not carry the doctrine beyond this. In that case two persons in partnership as sharebrokers contracted to buy shares. Before paying for them they dissolved partnership, and that fact was known to their bankers. After the dissolution one of the partners pledged the shares to the bankers for money to pay for their purchase, and authorized the bankers to sell the shares to indemnify themselves. The other partner contended that this was done without his authority, and that as the bankers knew of the dissolution, they could not retain the shares against him. The Vice-Chancellor, however, held that the partner who pledged the shares had authority after the dissolution to complete the contracts previously made by the firm; that he, therefore, necessarily had authority to raise the funds to pay for the shares in question, and that he had not gone beyond his authority in raising the money by pledging them with the bankers as he had done. The Lords Justices took the same view. "The general law," it was said, "is clear that a partnership, though dissolved, continues for the purpose of winding up its affairs. Each partner has, after and notwithstanding the dissolution, full authority to receive and pay money on account of the partnership, and has the same authority to deal with the property of the partnership for partnership purposes as he had during the continuance of the partnership. This must necessarily be so. If it were not, at the instant of the dissolution it would be necessary to apply to this court for a receiver in every case, although the partners did not differ on any one item of the account."

It is to be observed that in Butchart v. Dresser nothing was done except for the purpose of completing a transaction unfinished at the

[1] See Lyon v. Haynes, 5 Man. & Gr. 541, and Smith v. Winter, 4 M. & W. 461, 462.

[2] 10 H. A. 453, and 4 De G. M. & G. 542.

time of the dissolution. The case did not require the statement of so general a proposition as that until the affairs of a partnership are wound up, the agency of each partner continues to be as extensive as if no dissolution had taken place. At the utmost, the case under consideration decides that in the event of a dissolution it is competent for one partner to dispose of the partnership assets for partnership purposes.[1] But neither Butchart v. Dresser, nor any other case, shows that a person who knows that a partnership is dissolved, can hold one partner liable for acts of his late copartners done subsequently to the dissolution, and without authority; and if in Butchart v. Dresser the money to pay for the shares had been raised by a bill, it could not, consistently with prior decisions, have been held that the dissolved firm was liable, either upon the bill itself, or for the money raised by its means.

Before leaving this subject, it is necessary to notice Ault v. Goodrich,[2] which is sometimes supposed to go much further than it really does. In that case, two persons, Wilcox, the elder, and Wilcox, the younger, partners as timber merchants, entered into a joint speculation with the plaintiff and another in the purchase and sale of some trees. Wilcox, the younger, had the chief management of the affair, and before the adventure was closed the two Wilcoxes dissolved partnership. Wilcox, the younger, seems to have misapplied some of the moneys received by him on the joint account, and it was considered clear that Wilcox, the elder, was responsible for the dealings and transactions of Wilcox, the younger, during the continuance of the partnership. It was also considered that, as there was no evidence of any new speculation or agreement between any of the parties upon the dissolution of partnership between the Wilcoxes, the other parties to the adventure were to be treated as having continued to rely on the joint responsibility of the two Wilcoxes, in respect of the dealings of Wilcox, the younger. Wilcox, the elder, was accordingly declared to be responsible for the conduct of Wilcox, the younger, after the dissolution.

Upon this case it may be observed, first, that the facts are not satisfactorily stated; and, secondly, that the judgment leads to the inference that the responsibility of Wilcox, the elder, for the conduct of Wilcox, the younger, did not turn upon the circumstance that they were partners together, but upon the circumstance that they were

[1] *Qu.* if Lewis v. Reilly, 1 Q. B. 349, can be supported on this principle? Lord Denman's judgment seems to have proceeded on it.

[2] 4 Russ. 430.

jointly intrusted with the management of the tree speculation. In this view of the case it was obviously immaterial whether the Wilcoxes had dissolved partnership or not.

What amounts to notice of dissolution or retirement.

SEC. 581. It has been already seen that when a dormant partner retires, he need give no notice of his retirement in order to free himself from liability in respect of acts done after his retirement. The reason is that, as he was never known to be a partner, no one can have relied on his connection with the firm, or truly allege that, when dealing with the firm, he continued to rely on the fact that the dormant partner was still connected therewith.

But when an ostensible partner retires, or when a partnership between several known partners is dissolved, the case is very different; for then those who dealt with the firm before a change took place are entitled to assume, until they have notice to the contrary, that no change has occurred. And even those who never had dealings with the firm, and who only knew of its existence by repute, are entitled to assume that it still exists until something is done to notify publicly that it exists no longer.[1] An old customer, however, is entitled to a more specific notice than a person who never dealt with the firm at all;[2] and in considering whether notice of dissolution or retirement is sufficient or not, a distinction must be made according as the person sought to be affected by notice was a customer of the old firm or not.

When a known partner retires, or a partnership is dissolved, notice of the fact is usually given to the world at large by advertisement, and to old customers by some special communication.

Public notice given by advertisement in the "Gazette" is sufficient not only against all who can be shown to have seen it, but also as against all who had no dealings with the old firm, whether they saw it or not,[3] but an advertisement in any other paper is no evidence against any one who cannot be shown to have seen it.[4] If, however, it can be shown that he was in the habit of taking the paper,[5] that is evidence to go to the jury of his having seen not only the particular

[1] Parkin v. Carruthers, 3 Esp. 348.
[2] Graham v. Hope, Peake, 154.
[3] Godfrey v. Turnbull, 1 Esp. 371; Wrightson v. Pullan, 1 Stark. 375; Godfrey v. Macauley, 1 Peake (N. P.), 209; Newsome v. Coles, 2 Camp, 617.
[4] Leeson v. Holt, 1 Stark. 186, E. C. L. R. 2; Boydell v. Drummond, 11 East, 144, *n.*
[5] Showing that the paper circulated in his neighborhood goes for nothing alone. Norwich and Lowestoft Co. v. Theobald, M. & M. 153, E. C. L. R. 22.

paper containing the advertisement, but also the advertisement itself;[1] and if the jury are satisfied that he saw the advertisement, that will be sufficient, although no advertisement was inserted in the "Gazette."[2] An advertisement, moreover, is not indispensable; its place may be supplied by something else. Thus a change in the name of a firm painted on its counting-house, accompanied by a removal of the business of the old firm (for the purpose of winding up), and coupled with announcements of the change by circulars sent to the old customers, was held to be sufficient without any advertisement as against a person who had not been an old customer, and who was not proved to have had any distinct notice.[3]

As against persons who dealt with the firm before any change in it took place, an advertisement without more is of little or no value, whether it be in the "Gazette" or elsewhere.[4] But if notice in point of fact can be established, it matters not by what means, for it has never been held that any particular formality must be observed. And if an old customer can be shown to have seen an advertisement, that will be sufficient, and evidence that he took in a certain paper is some evidence that he knew of a dissolution advertised therein.[5] Again, general notoriety, a change in the name of the firm and advertisements, coupled with the execution of powers of attorney to the new firm, were held (Bolland, B., *dissentiente*) to warrant the jury in finding knowledge by an old customer of a change in the old firm.[6] So, in the case of bankers, a change in the name of the firm appearing on the face of the checks used by their customers, has been held sufficient notice to an old customer who had drawn checks in the new form.[7] With respect to advertisements, it may be here remarked that an advertisement of an agreement to dissolve is not admissible in evidence unless stamped, but that an advertisement of an actual dissolution is admissible without a stamp.[8]

Termination of liability as to past acts.

SEC. 582. When once it can be shown that liability has attached to any partner, the *onus* of proving that such liability has ceased is upon that partner or those representing him.[9] The events determining his liability may be reduced to four classes, viz.:

[1] See Jenkins v. Blizard, 1 Stark. 418; Rowley v. Horne, 3 Bing. 2.
[2] Rooth v. Quin, 7 Price, 193.
[3] M'Iver v. Humble, 16 East, 169; but see Gorham v. Thompson, 1 Peake's N. P. 60.
[4] Graham v. Hope, Peake, 154.
[5] Jenkins v. Blizard, 1 Stark. 418, where, however, the plaintiff had a verdict.
[6] Hart v. Alexander, 2 M. & W. 484; 7 C. & P. 746.
[7] Barfoot v. Goodall, 3 Camp. 147.
[8] May v. Smith, 1 Esp. 283; Jenkins v. Blizard, 1 Stark. 418.
[9] See 3 Mer. 619.

1. Events over which his creditor has no control, *e. g.*, the death, bankruptcy, or insolvency of the partner.

2. Dealings and transactions between the creditor and the partner whose liability is in question.

3. Dealings and transactions between the creditor and the other members of the firm; and

4. Lapse of time.

The second of these classes of events does not require special notice. The effect of bankruptcy, insolvency and death, will be examined in a subsequent part of this work. There only remain, therefore, to be considered here the third and fourth classes of events alluded to.

The nature of an obligation which is joint, or joint and several, is such that, although each person in whom it resides is responsible for its performance, yet each is not bound to perform it without reference to the question whether it has already been performed by the others; for whether the obligation be joint, or joint and several, it has only to be performed once, and performance by any one of the persons obliged is available as a defense to a second demand made against the others.[1] And not only is a joint, or joint and several, obligation at an end when performed by one of the persons in whom it resides, but whatever extinguishes the right to demand performance of that obligation extinguishes the obligation itself, and discharges all the persons in whom it resided.[2] But an event which merely disables a creditor from suing one of several persons jointly, or jointly and severally, indebted to him, does not necessarily extinguish the debt. For example, if one of the persons indebted becomes bankrupt and obtains his certificate, although his liability is thereby at an end, yet the other persons indebted are not discharged from their obligation to pay.[3] So, a covenant by the creditor not to sue one of several persons liable jointly, or jointly and severally, does not extinguish the creditor's right to obtain payment, its effect only being to give the covenantee a right to be indemnified by the creditor against the consequences of an exercise of his right.[4] So, if the creditor receives from one of several debtors part of the debt, this does not discharge the others from their liability to pay the residue.[5]

[1] See, as to payment by one, Walters v. Smith, 2 B. & Ad. 889, E. C. L. R. 22; Thorne v. Smith, 10 C. B. 659; Beaumont v. Greathead, 2 id. 494.

[2] See Cheetham v. Ward, 2 Bos. & P. 630; Ex parte Slater, 6 Ves. 146; Ballam v. Price, 2 Moo. 235; Cocks v. Nash, 9 Bing. 341; Wallace v. Kelsall, 7 M. & W. 264; Nicholson v. Revill, 4 A. & E. 675.

[3] Crosse v. Smith, 7 East, 256; 12 & 13 Vict. c. 106, § 200; Noke v. Ingham, 1 Wils. 89; 1 Wms. Saund. 207 a.

[4] See Lacy v. Kinaston, 1 Ld. Raym. 688; Dean v. Newhall, 8 T. R. 168; Walmesley v. Cooper, 11 A. & E. 216.

[5] See Walters v. Smith, 2 B. & Ad. 889.

Payment.

SEC. 583. Payment of a partnership debt by any one partner discharges all the others, if the object of the partner paying was to extinguish the whole debt, or if he made the payment out of the partnership funds. But if a firm is unable to pay a debt, and one partner out of his own moneys pays it, but in such a way as to show an intention to keep the debt alive against the firm for his own benefit, this payment by him will be no answer to an action brought against the firm by the creditor suing on behalf of the partner who made the payment.[1]

If a partner is indebted on his own account to a person to whom the firm is also indebted, and that partner, with the moneys of the firm, makes a payment to the creditor without specifying the account on which it is paid, the payment must be taken to have been made on the partnership account, and must be applied accordingly.[2]

Inasmuch as a payment by A of B's debt, on behalf of B, inures to the benefit of B, if his creditor accepts the money and B does not repudiate the payment,[3] it follows that if a firm is indebted, and, by the retirement of the original partners and the introduction of other partners, a wholly new firm is called into existence, a payment by the new firm expressly or impliedly on behalf of the old firm, of the debts contracted by the old firm, will extinguish its debt as between that firm and its creditor. But if there are circumstances showing that the money was paid, not on behalf of the old firm and in discharge of its liability, but as the consideration for a transfer to the new firm of the creditor's right against the old firm, the right of the creditor to sue the old firm will not be extinguished, but can still be exercised for the benefit of the new firm.[4]

As regards discharge by payment, it is important to bear in mind the doctrine laid down in Clayton's case,[5] that where there is one single open current account between the two parties, every payment, which cannot be shown to have been made in discharge of some particular item, is imputed to the earliest item standing to the debit of the payer. If, therefore, a customer of a firm of bankers has funds

---

[1] M'Intyre v. Miller, 13 M. & W. 725.

[2] Thomson v. Brown, Moo. & M. 40.

[3] Co. Lit. 207, a. See Belshaw v. Bush, 11 C. B. 191; Jones v. Broadhurst, 9 id. 193; Kemp v. Balls, 10 Ex. 607; Lucas v. Wilkinson, 1 H. & N. 420.

[4] See Lucas v. Wilkinson, 1 H. & N. 420; M'Intyre v. Miller, 13 M. & W. 725, where one partner paid a debt due from the firm, but had the debt transferred to a trustee for himself.

[5] 1 Mer. 572. See, in addition to the cases cited in the text as illustrating the rule in question, Ex parte Randleson, 2 D. & Ch. 534; Pennell v. Deffell, 5 De G. M. & G. 372; Copland v. Toulmin, 7 Cl. & Fin. 349.

standing to his credit at the time they dissolved partnership, and his account is continued by their successors, they taking new deposits and honoring his drafts as if no change had occurred, and blending the accounts, then the payments first made by the new firm will be deemed to have been made in liquidation of the earliest item on the credit side of the customer's account, viz., the balance due to him at the time of the dissolution; and consequently, if, proceeding on this principle, that balance is liquidated, the customer has no claim against the old firm in respect of his account with them.

This doctrine is of such importance in questions relating to the discharge of retired and deceased partners, that one or two of the leading cases upon it may be usefully noticed.

Rule in Clayton's case.

SEC. 584. In Clayton's case,[1] Clayton was a customer of a banking firm consisting of five partners. One of the partners, Devaynes, died, and the banking business was continued under the old name by the four surviving partners. At the time of Devaynes' death there was a balance of 1,713*l.* due to Clayton on his cash account with the bank. After Devaynes' death the continuing partners received and paid money on Clayton's account, and that account was not treated as two accounts, one with the old firm ending on Devaynes' death, and the other with the new firm beginning from that time, but as one entire and unbroken account. Some time after Devaynes' death the banking firm became bankrupt, and at that time there was a considerable sum due to Clayton, but the payments made by the bank on his account, after Devaynes' death and before the bankruptcy, considerably exceeded the before-mentioned balance of 1,713*l.* Under these circumstances it was held that Clayton had no claim against Devaynes' estate in respect of this balance. The Master of the Rolls, after noticing the general rule giving the debtor the right to appropriate a payment made by him, and giving the creditor a right to appropriate a payment not appropriated by the debtor in the first instance, observed, "This is the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying this draft is to be placed to the account of the 500*l.* paid in on Monday, and this other to the account of the 500*l.* paid in on Tuesday. There is a fund of 1,000*l.* to draw upon, and that is enough. In such a case there is no

[1] 1 Mer. 572.

that those proceeds ought to be applied in liquidation of the balance due when the dormant partner retired, inasmuch as the last bills were given to take up the dishonored bills, and they had been given on account of that balance. In this case the rule in Clayton's case was, in fact, applied, but there were circumstances showing an actual intention that it should apply, and the decision proceeded on that ground.

Application of the rules adopted in the preceding cases.

SEC. 588. It need hardly be observed that the rule in Clayton's case applies to all accounts of the nature of one entire debit and credit account, without reference to any question of partnership, and is available not only by a firm against an old creditor, but also against a firm for the benefit of its debtors. For example, where a person becomes surety to a firm guaranteeing a debt owing to it by a third party, then, if the debt is an item in an account between this third party and the firm, and is liquidated by general payments with which he is credited, the debt guaranteed will be extinguished, and the surety will be discharged, although upon the whole account there may always have been a balance owing to the firm.[1]

Moreover, as a creditor has no right to take the account subsisting between him and his debtor backward, so as to make himself appear a creditor in respect of the earlier rather than of the later items of the account, so, on the other hand, a debtor, after making general payments in respect of one entire account, is not at liberty to have those payments applied in liquidation of the subsequent rather than of the earlier items.

Illustration—Beale v. Caddick.

SEC. 589. In the late case of Beale v. Caddick,[2] two partners, A and B, were indebted to C, their banker, in a sum of 979*l.* C transferred his business to another bank, and A and B's account was, with A's assent, transferred to the new bank, and the first item in this account to A and B's debit was the above-mentioned balance of 979*l.* Several payments were made by A on account of himself and copartner, and such payments were placed by the new bank to the credit of A and B in the usual way. These payments more than equaled the first item of 979*l.* on the debit side, but, owing to payments made by

[1] See Bodenham v. Purchas, 2 B. & Ald. 39; Williams v. Rawlinson, 3 Bing. 71; Field v. Carr, 5 id. 11; Pemberton v. Oakes, 4 Russ 154; Toulmin v. Copland, 3 Y. & C. Ex. 625, and Copland v. Toulmin, 7 Cl. & Fin. 350; Bank of Scotland v. Christie, 8 id. 214.

[2] 2 H. & N. 326.

the new bank on A and B's account, there was a considerable balance due from them to the bank. The account as it stood from time to time appeared in the pass-book, and was never objected to by A. The deed by which C transferred his business to the new bank gave the new bank an option, to be declared within a year, of taking or rejecting any of C's customer's accounts, and within the year the new bank gave notice to C, declining to take A and B's account. The new bank having brought an action against A and B for the balance due on their account, the defendants contended that the first item standing to their debit was owing to C, and not to the new bank, which had declined to accept C's transfer of that debt, and that, rejecting that item, there was nothing due to the plaintiffs. It was, however, held that, as betwen A and B and the new bank, the debt of 97*l.* had been conclusively taken into account, and that the items on the other side must be applied first of all in liquidation of that sum, and that the plaintiffs were therefore entitled to recover the balance due to them on the whole amount.

The rule in Clayton's case, however, applies only to an entire unbroken account, and has no application to cases where one person is indebted to another in respect of several matters, each of which forms the subject of a distinct account. In such a case, if the debtor does not appropriate the payment when he makes it, the creditor is at liberty to apply the payment to whichever account he thinks proper. Moreover, when a change takes place in a firm by the retirement or death of a member, a creditor of the firm is under no obligation to assent to a carrying out of his debt, so that it shall form the first item in a fresh account with the new firm. He is at liberty to keep the accounts with the two firms distinct, and if he does so, payments made generally by the new firm will not necessarily go, by virtue of the rule in Clayton's case, in liquidation of the debt owing by the old firm.

Simson v. Ingham.

SEC. 590. A remarkable illustration of this is afforded by the well-known case of Simson v. Ingham.[1] There two country bankers, Benjamin and Joshua Ingham, gave a bond to a London bank as a security for advances which it might make on account of the persons constituting the country bank, or either of them, associated or not with any other persons. Benjamin died, and at his death a consider-

[1] 2 B. & Cr. 65.

able sum was due to the London bank for advances made to the country bank. The London bank was in the habit of sending in monthly accounts to the country bank. In the month following Benjamin's death the London bank received and paid considerable sums on account of the country bank, and the sums were entered by the London bank in its own books in continuation of the former accounts between it and the old country bank. No account, however, was sent to the country bank until two months after Benjamin's death, and then two accounts were sent, one of them being on account of receipts and payments prior to his death and the other being an account of receipts and payments made subsequently thereto. A considerable balance was due to the London bank on the first of these accounts and to recover this balance an action was brought against Joshua's representatives. It was contended that his estate was discharged by virtue of the rule in Clayton's case, the London bank having received since his death much more than sufficient to liquidate that balance; but it was held that the rule in question did not apply. The judgment of Mr. Justice Bayley contains such an admirable statement of the principles applicable to such cases that no hesitation has been felt in setting it out at length.

"The general rule is, that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. But there is a third rule, viz., that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firms in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In that case it is to be presumed that all the parties have consented that it should be considered as one entire account, and that the death of one of the partners has produced no alteration whatever. In this case the partner died in September, 1814. If, in the ordinary course of business, a monthly account had been sent in, stating the transactions before and after the death of the partner, as forming part of one entire account, and the balance as due from the survivors, in that case the creditor would have been precluded, and would have had no right to have said that the payments made subsequently to the death

of the partner should be applied to any but the old account. In fact, the bankers in London did not send in any account after the death of the partner until November, and then they sent in two distinct accounts, one made up to the day of the death of the partner, and the other commencing from that period. At that time, therefore, the bankers in London expressed their dissent from making the whole one entire account. It has been insisted that at that period of time they had no right so to do, because they were precluded by the entries which they had already made in their own books in the intermediate space of time. If, indeed, a book had been kept for the common use of both parties, as a pass-book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account; but entries made by a man in books which he kept for his own private purposes, are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time he continues to have the option of applying the several payments as he thinks fit. For these reasons I am of opinion that the plaintiffs were not precluded from applying the payments to the new account, and, therefore, this award is right."

The case of Simson v. Ingham was decided upon the principle that a creditor of a firm has a right, when a change occurs in the firm, to decide for himself whether the sum due to him from the old firm shall or not form an item in his account with the new firm. This principle is further illustrated by the case of Jones v. Maund.[1] There, three persons, A, B and C, were partners, and D was indebted to them in a sum secured by a covenant and a mortgage. A and B died; C retired and assigned her interest to E, who, with F, continued the business of the old firm under the old name. D continued to deal with the new firm, and he made it several payments, more than sufficient to liquidate the debt above-mentioned if appropriated thereto. The mortgage had been realized, and the sum arising from it had been applied in part discharge of the debt secured by it. There was nothing to show that D's debt had been made an item in the account between him and the new firm, and it was consequently held that D had no right to insist that the payments made by him generally to the new firm should be applied to the balance due from him on his covenant.[2]

[1] 3 Y. & C. Ex. 847.

[2] The case was decided on demurrer, and according to the report it was held that the balance due on the covenant

Partner may bind firm by assenting to transfer of a debt due either from or to it.

SEC. 591. It should be borne in mind with reference to cases of this description that one partner can bind the firm by assenting to a transfer of a debt, due to or by it, from one account to another.[1]

The rule in Clayton's case, viz., that in current accounts it is presumably the sum first paid in that is first drawn out, or, in other words, that presumably it is the first item on the debit side of the accout which is discharged or reduced by the first item on the credit side, is a rule based on the presumed intention of the parties.[2] It is not (as is sometimes represented) a rule of law obtaining independently of their will, and consequently, if it can be shown that some other appropriation was intended, the rule ceases to be applicable. An intention to appropriate a payment to some particular debt may be inferred from the usual course of business between the parties,[3] from the source from which the money was obtained,[4] from the security to meet which the payment was made,[5] from the representations of the parties,[6] and from other circumstances.[7]

Illustration — Wickham v. Wickham.

SEC. 592. An instructive case on this head is Wickham v. Wickham,[8] which in substance was as follows: A firm of Finch & Sons, as agents of the plaintiffs, supplied goods to the firm of Smith & Willey upon the terms that the latter should become debtors to the plaintiff in respect of such goods. Finch & Sons also supplied Smith & Willey with other goods on their own behalf. In the accounts between Finch & Sons and Smith & Willey, no distinction was made between goods supplied by Finch & Sons on their own behalf, and those which they supplied as agents of the plaintiffs. Smith & Willey made payments generally on account, and applying the rule in Clayton's case, nothing was due from Smith & Willey in respect of the goods supplied to them on behalf of the plaintiffs. However, Edward Finch was a partner in both firms, and representations

could not be considered as liquidated, unless it could be shown that it had, with C's assent, been made an item in the account between D and the new firm. But *quære* what C had to do with it, she having assigned all her interest in the debt to the new firm. Did she not thereby authorize the new firm to deal with the debt as it liked? See Pemberton v. Oakes, 4 Russ. 154.

[1] Beale v. Caddick, 2 H. & N. 326.

[2] Wilson v. Hurst, 4 B. & Ad. 767, per Lord Denman, in Copland v. Toulmin, 7 Cl. & Fin. 349, there was evidence to show an agreement for a different appropriation, but it was not deemed sufficient to exclude the rule.

[3] Taylor v. Kymer, 3 B. & Ad. 320; Lysaght v. Walker, 5 Bli. (N. S.) 1.

[4] Stoveld v. Eade, 4 Bing. 154; Thompson v. Brown, Moo. & M. 40.

[5] Newmarch v. Clay, 14 East, 240.

[6] Wickham v. Wickham, 4 K. & J. 478.

[7] See Henniker v. Wigg, 5 Q. B. 792.

[8] 2 K. & J. 478.

were made to the plaintiffs by the firm of Finch & Sons to the effect that a large debt was due to the plaintiffs from the firm of Smith & Willey, and Finch & Sons undertook that Edward Finch should use his influence as a partner in the firm of Smith & Willey, to secure the reduction of such debt. Upon the faith of this representation and undertaking the plaintiffs forbore to sue Smith & Willey. It was held that the firm of Smith & Willey was precluded from treating its debt to the plaintiffs as liquidated by the payments made by it to the firm of Finch & Sons, for it was not competent to the two firms so to arrange their accounts as to liquidate a debt which a person who was a partner in both firms represented to the plaintiffs as still owing to them.

Upon the same principle, viz., that the rule in Clayton's case is founded on the presumed intention of the parties, it follows that it cannot be applied as against a person who is a creditor in respect of a fraud committed on him and of which he is ignorant. This in fact was determined in Clayton's case itself. For Clayton, in addition to the claim which was held to have been discharged by the operation of the rule as noticed above, had another claim upon Devaynes' estate, arising out of a breach of trust committed by a fraudulent sale of some exchequer bills, and of which sale he was kept in ignorance. The payments made to Clayton since Devaynes' death were more than sufficient to satisfy both claims; but it was held, that the claim arising out of the concealed sale of the bills was not affected by those payments.[1]

Application of payments.

SEC. 593. Before leaving the subject of appropriation of payments it may be as well to advert to a question of some difficulty which arises when a person indebted to a firm, and also to an individual member of it, pays him a sum of money under such circumstances that it cannot be ascertained on account of which debt the payment was made. In such a case ought the payment to be applied in liquidation of the debt due to the partnership or of that due to the individual member? Pothier[2] says that good faith requires that the partner receiving the money should apply it proportionately to both demands. The writer is not aware of any decision on this subject, but he apprehends that, as between the partner and the debtor, the payment might be applied to either debt at the option of the part-

[1] See Clayton's case, 1 Mer. 572–580. [2] Pothier, "Société," § 121.

ner,[1] whilst, as between the partner and his copartners, good faith requires that the payment should be applied wholly to the partnership debt.[2]

Release.

SEC. 594. Both at law and in equity, a release of one partner from a partnership debt discharges all the others,[3] for where several persons are bound jointly, or jointly and severally, a release of one is a release of them all.[4] But in this respect a covenant not to sue differs from a release, for although where there is only one debtor and one creditor, a covenant by the latter never to sue the former is equivalent to a release, it has been decided on several occasions that a covenant not to sue does not operate as a release of a debt owing to or by other persons besides those who are parties to the covenant.[5]

If a release is so drawn as to show beyond all doubt that it was intended to inure only for the benefit of the releasee personally, and not to avail even him in an action by the releasor against the releasee, jointly with other people, then persons jointly liable with him in respect of the debt released will not be discharged therefrom. In such a case the deed will itself show that it was not in fact intended to operate as a release.

Rule in Solly v. Forbes — Price v. Barker — Hartley v. Manton.

SEC. 595. In Solly v. Forbes,[6] the defendants, Forbes and Ellerman, were partners, and were indebted to the plaintiffs, and had stopped payment. In consideration of a sum paid by Ellerman, the plaintiffs released him from all further demands, but it was declared in the release (to which, however, Forbes was not a party), that nothing therein contained should affect the plaintiff's rights against Forbes, either separately or as partners with Ellerman, or against the joint estate of the two, and that it should be lawful for the plaintiffs to sue Ellerman, either jointly with Forbes, or separately, for the purpose of obtaining satisfaction of their debt, either out of the joint estate

[1] But see Pritchard v. Draper, 1 R. & M. 191, in which it was held that after a dissolution the partner who carried on the business had no authority to apply moneys of a person indebted both to himself and to the firm, to the debt of the firm.

[2] See Thompson v. Brown, Moo. & M. 40.

[3] Bower v. Swadlin, 1 Atk. 294; Ex parte Slater, 6 Ves. 146; Cheatham v. Ward, 1 Bos. & P. 630; Cocks v. Nash, 9 Bing. 341.

[4] See the last note, and as to joint and several obligations, Co. Lit. 232, *a*; Lacy v. Kinaston, 1 Lord Raymond, 690; Kiffin v. Evans, 4 Mod. 379.

[5] Clayton v. Kinaston, 2 Salk. 573; Lacy v. Kinaston, 1 Lord Raymond, 688, and 2 Salk. 575; Hutton v. Eyre, 6 Taunt. 289; Dean v. Newhall, 8 T. R. 168; Walmsley v. Cooper, 11 A. & E. 216, and see Price v. Barker, 4 E. & B. 760.

[6] 2 Brod. & Bing. 38.

of the two, or from Forbes. In an action brought by the plaintiffs against Forbes and Ellerman to recover the debt owing by them, it was held that this deed was no bar to the action. Price v. Barker[1] is a later decision on a similar deed, and is to the same effect. Again, in Hartley v. Manton,[2] where a bill was drawn by a firm on, and was accepted by one partner, it was held that a release of the drawers did not discharge the acceptor, the object of the release being to discharge the joint liability of the firm, but not to affect the several liability of the accepting partner.

In construing releases particular attention must be paid to the recitals, for, however general the operative words of the deeds may be, they will be confined so as not to affect more than the parties appear from the deed itself to have contemplated.[3] If several persons are bound by a bond jointly, or jointly and severally, and their creditor removes the seal of one of them from the bond, all the others are discharged, but if the obligors are only bound severally, and in no sense jointly, then the removal of the seal of one of them does not affect the liability of the others.[4] An arrest of a debtor, followed by a discharge of him by the arresting creditor, is equivalent to a release by the latter of his debt; whence it follows that if a creditor of a firm obtains judgment against it, and arrests the partners, and then lets one of them go, the others are entitled to be discharged from custody.[5]

Substitution of debtors and securities by agreement.

SEC. 596. A liability which is originally joint and several may be extinguished by being replaced by a liability of a different nature, and this may happen in one or two ways, viz., either by an agreement to that effect come to between the parties liable and the person to whom they are liable, or by virtue of the doctrine of merger, independently of any such agreement.

In order that one liability may be extinguished by being replaced by another by agreement, it is essential that the person in whom the correlative right resides should be a part to the agreement, or should, at all events, show by some act of his own that he accedes to the substitution. If A, being indebted to B, transfers his liability to C, and B does not assent to the transfer, his rights are wholly unaffected, he

[1] 4 E. & B. 760. See, too, Thompson v. Lace, 3 C. B. 540; Willis v. De Castro, 4 C. B. (N. S.) 216.

[2] 5 Q. B. 247.

[3] See, for illustrations of this rule, Lindo v. Lindo, 1 Beav 496; Payler v. Homersham, 4 M. & S. 423; Simmons v. Johnson, 3 B. & Ad. 175; Boyes v. Bluck, 13 C. B. 652; Lampton v. Corke, 5 B. & Ald. 606.

[4] See Collins v. Prosser, 1 B. & C. 682.

[5] Ballam v. Price, 2 Moo. 235.

will neither acquire any right against C nor lose his former right against A. As regards B, the agreement between A and C is *res inter alios acta*, and it does not in any way benefit or prejudice him. But if B assents to the arrangement come to between A and C, and adopts C as his debtor instead of A, then A's liability to B is at an end, and B must look for payment to C, and to him alone.[1]

To apply this to cases of partnership, let it be supposed that a firm of three members, A, B, and C, is indebted to D, that A retires, and B, and C, either alone or together with a new partner, E, take upon themselves the liabilities of the old firm. D's right to obtain payment from A, B, and C, is not affected by the above arrangement, and A does not cease to be liable to him for the debt in question. But if, after A's retirement, D accepts as his sole debtors B & C, or B, C, & E (if E enters the firm), then A's liability will have ceased, and D must look for payment to B & C, or to B, C & E, as the case may be. When, therefore, a partner has retired, and a creditor of the firm continues to deal with the continuing partners and such other persons, if any, as may have become associated with them in partnership, it is of great importance to ascertain whether the creditor has or has not accepted the new firm as his debtors in lieu of the old firm. If he has, the retired partner's liability will have ceased, whilst if he has not, it will still continue.

Nothing is more common than for promoters of companies to put forward a prospectus in which it is said that all liability on the part of a shareholder will cease on a transfer of his share, but the hope thus held out is as false and delusive as that intended to be raised by the assertion that the liability of the shareholders will be limited to the amount of their shares.[2] It cannot be too often repeated that merely by retiring a partner or a shareholder gets rid of no liability as to past transactions, unless there is some statutory enactment applicable to his case, and the same observation applies to a total dissolution. To use the words of Mr. Justice Heath, "when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future. With regard to things past, the partnership continues and always must continue."[3]

---

[1] See per Buller, J., in Tatlock v. Harris, 3 T. R. 180.

[2] See Blundell v. Winsor, 8 Sim. 613.

[3] Wood v. Braddick, 1 Taunt. 104. Therefore partners continue liable on the covenants entered into by them in a lease of the partnership premises, although the firm may have been dissolved since the lease was granted. See Hoby v. Roebuck, 7 Taunt. 157; Graham v. Wichelo, 1 Cr. & M. 188.

Although the partners themselves may agree that on the retirement of one of them the others shall take upon themselves all the debts and liabilities of the old firm, such an agreement in no way affects the creditors, it is a mere contract of indemnity,[1] valid indeed, as amongst the parties to it, but not in any way varying the rights of others as to whom it is *res inter alios acta*. A good illustration of this is afforded by Smith v. Jameson.[2] There the two defendants were partners, one of them, with the privity of the other, improperly carried some trust moneys to their joint account, thereby incorporating them with the partnership assets. Afterward, on a dissolution of partnership, the partnership assets were assigned to the first partner and he took upon him the debts of the firm, but this was held in no way to alter as against the *cestui que trust* the liability of both partners to make good the trust moneys.

Turning now to those cases which bear upon the question of discharge by virtue of a substitution by a creditor of one debtor for another, it will be found that notwithstanding some conflict between them, they are all professedly based on a few simple principles, the most important of which are as follows:

Agreement by creditors to look to remaining partners for their debt is valid.

SEC. 597. There is no *a priori* presumption to the effect that the creditors of a firm do, on the retirement of a partner, enter into any agreement to discharge him from liability.

An agreement by a creditor of several persons liable to him jointly to discharge one or more of them, and look only to the others, is not necessarily invalid for want of consideration; for in some respects the security of one person liable solely is, or at all events may be, preferable to the security of that same person if only liable jointly with others, *e. g.*, in case of bankruptcy or death.[3] If, therefore, one partner retires, and a creditor of the old firm goes on dealing with the continuing partners, it is for the jury to say whether, in point of fact, the creditor abandoned the security of the retired partner and looked only to the continuing partners, and if the jury find in the affirmative, the court will not disturb the verdict on the ground that the abandonment cannot be sustained in point of law for want of consideration to support it.[4]

[1] See Rodgers v. Maw, 4 Dowl. & L. 66.

[2] 5 T. R. 601. See, too, Dickenson v. Lockyer, 4 Ves. 36; Cummins v. Cummins, 8 Ir. Eq. 723.

[3] See per Parke, Baron, in Kirwan v. Kirwan, 2 Cr. & M. 617.

[4] Thompson v. Percival, 5 B. & Ad. 925; E. C. L. R. 27, correcting Lodge v. Dicas, 3 B. & Ald. 611; and David v. Ellice, 5 B. & C. 196.

Except under special circumstances a creditor who discharges one partner discharges all. Consequently, if a creditor discharges a retired partner, and acquires no new right to obtain payment from the others, either alone or with a new partner; the creditor will be altogether remediless. One test, therefore, by which to determine whether a retired partner has been discharged is, to see whether the creditor has obtained a new right to demand payment, for if he has not, no discharge can possibly be made out by any evidence which fails to establish an extinguishment of the creditor's demand altogether.

Bearing the foregoing principles in mind, it will not be difficult to reconcile most of the cases relating to the liability of retired partners for debts incurred before their retirement. They may be conveniently classified thus:

Cases in which a retired partner has not been discharged.

No new partner having been introduced into the firm.

Although a new partner has been introduced into the firm.

Cases in which a retired partner has been discharged.

After these cases have been examined, the analogous cases relating to the discharge of the estate of the deceased partner will be noticed.

Cases in which a retired partner has not been discharged, no new partner having been introduced into the firm.

SEC. 598. The strongest cases of this class are Lodge v. Dicas and David v. Ellice. In Lodge v. Dicas,[1] the two defendants, Dicas and Rondeau, had been in partnership; when they dissolved they agreed that Rondeau should get in the partnership debts, and discharge the plaintiffs' demand. The plaintiffs were informed of this arrangement, and they agreed to exonerate Dicas from all liability as to the partnership account, and stated that they should charge their debt to Rondeau's private account. The debt, however, not being paid, and Rondeau having become embarrassed, the plaintiffs brought an action against him and Dicas, and it was held that Dicas had no defense, as the agreement to discharge him and look only to Rondeau was invalid for want of consideration.

In David v. Ellice,[2] three partners who were indebted to the plaintiff dissolved partnership, one of them retiring, and the other two continuing to carry on the business in partnership together. It was agreed that the continuing partners should take the assets and also the liabilities of the old firm. Of this the plaintiff had notice; his debt was transferred with his consent to the books of the new firm;

[1] 3 B. & Ald. 611; E. C. L. R. 5. [2] 5 B. & C. 196, and 1 C. & P. 369.

he afterward drew on the new firm for part of his debt, and they accepted and paid his draft. The new firm afterward becoming insolvent, the plaintiff brought an action for the recovery of his debt, and sued the retired partner as well as the members of the new firm. It was held that the retired partner continued liable, for that the plaintiff had done nothing to discharge him, and the fact that no person had become liable to the plaintiff, who was not so originally, was relied upon by the court as showing that there was no consideration for the alleged discharge.[1]

These two cases have been much criticised,[2] and they cannot at the present time be relied upon as authorities for the proposition that a creditor of a firm cannot, for want of consideration, abandon his right against a retiring partner, and retain it against the others, unless they give some fresh security. There can be little doubt that if similar cases were to arise again, and the jury found for the defendant, the verdict would not be disturbed.

This appears from Thompson v. Percival.[3] In that case, the defendants, Charles Percival and James Percival, had as partners become indebted to the plaintiff. The partnership was dissolved, and it was agreed that the business should be carried on by James, and that he should receive and pay all debts, and assets sufficient to pay debts of the firm were left in his hands. The plaintiff, on applying to James for payment, was told that he must look to him, James, alone, and the plaintiff accordingly drew a bill on James, and the bill was accepted by him. The bill being afterward dishonored, the plaintiff sued both James and Charles for the original debt, and obtained a verdict for the full amount; but the defendants had leave to move for a nonsuit if the court should be of opinion that Charles had been discharged. The court, without deciding that point, held that the question ought to have been left to the jury, and a new trial was, therefore, directed. The court held that the facts proved raised a question for the jury, whether it was agreed between the plaintiff and James that the former should accept the latter as his sole debtor, and should take the bill of exchange accepted by him alone by way of satisfaction for the debt due from both. If it was so agreed, the court thought that the agreement and receipt of the bill would be a good answer on the part of Charles by way of accord and satisfaction.[4]

[1] See, too, Thomas v. Shillibeer, 1 M. & W. 124.

[2] See 5 B. & Ad. 933; 2 Cr. & M. 623; 2 M. & W. 493.

[3] 5 B. & Ad. 929.

[4] In Evans v. Drummond, 4 Esp. 89, and Reed v. White, 5 id. 122, a retiring partner was held discharged on the ground here referred to.

It is not unusual to represent Lodge v. Dicas and David v. Ellice as altogether overruled by Thompson v. Percival, and other cases. This, however, is going too far. The three cases together establish (1) that a creditor who treats the continuing partners as his debtors does not necessarily abandon his right to resort to a retired partner for payment; (2) that whether he does or not is a mixed question of law and fact which ought to be submitted to a jury; and (3) that their verdict will not be disturbed by the court upon the grounds acted on in Lodge v. Dicas and David v. Ellice.

That a creditor who treats the continuing partners as his debtors does not without more discharge a retired partner, is shown by other cases, and especially by those in which the continuing partners have paid interest on the old debt at a rate or in a manner differently from that previously adopted.

An old case on this head, and one often referred to, is Heath v. Percival,[1] in which two partners indebted to the plaintiff on a bond dissolved partnership. One of them continued to carry on the business and took upon himself the partnership debts and public notice was given that the creditors of the firm were either to come in and be paid their debts, or to look for payment to the continuing partner only. The plaintiff came in, but instead of being paid off, he kept the bond, receiving interest at 6*l.* instead of 5*l.* per cent. It was held that he did not thereby discharge the retired partner from his liability to pay the bond with interest at 5*l.* per cent.

Moreover, if the continuing partners give a new security for the old debt, this will not operate to discharge the retired partner, unless the creditor intended that such should be the case, or unless the new security is of such a nature as to merge the original debt. In Bedford v. Deakin,[2] three partners were indebted to the plaintiff on bills of exchange. They dissolved partnership and arranged between themselves that one of them should pay the plaintiff. The plaintiff was informed of this arrangement and took from one of the partners his separate promissory note, indorsed by a third party, for the amount of the debt, but expressly reserved his right to look to all three partners for payment, and the plaintiff retained the bills already in his possession. The notes, when due, were taken up by other bills, and they in their turn were several times renewed. Ultimately the plaintiff sued all the three partners on the original bills, and he was

[1] 1 P. W. 682, and 1 Str. 403.

[2] 2 B. & Ald. 210. See, too, Featherstone v. Hunt, 1 B. & C. 113; Spenceley v. Greenwood, 1 Fos. & Fin. 297.

held entitled so to do, never having discharged any of them, either intentionally or otherwise.

The principle of the above cases applies to *dormant* partners even more strongly than to others, for a creditor, who has a security of which he is unaware, cannot intentionally give up that security. Therefore, if A and B are partners, and the two become indebted to a creditor who knows only of A, and then B, the dormant partner, retires, no dealings between the creditor and A will discharge B from his liability to be sued when discovered, unless those dealings extinguish the original debt not only as against B but also as against A.[1]

Cases in which a retired partner has not been discharged, although a new partner has been introduced into the firm.

SEC. 599. The introduction of a new partner has no effect on the liability of a retired partner, unless the liability of the former is substituted by the creditor for that of the latter, which cannot be the case unless the creditor can, as of right, hold the new partner liable for the old debt. This, moreover, he cannot do by virtue of any agreement between the partners themselves, and even if the new firm adopts the old debt and pays interest on it, this is *prima facie* only in pursuance of some agreement between the partners themselves, and a creditor who does no more than allow the partners to carry out that agreement, does not debar himself of his right to look for payment to those originally indebted to him.

A leading case on this head is Kirwan v. Kirwan.[2] There, three partners, C, M, and N, were indebted to the plaintiff. C retired, and M and N continued in partnership together and agreed to discharge the debts of the old firm. M afterward retired, and N took in a new partner. The plaintiff's account was transferred from the books of the old to the books of the new partnership, and interest was paid, and accounts were rendered to him as before. The plaintiff was informed of the dissolution, and had stated to one of the retired partners that he was aware he had no further claim upon him. But it was held that the three original partners remained liable, as there was nothing to show that the security of the new firm had been substituted for that of the old, and the statement above referred to could not be regarded as an agreement to discharge the retired partner.

In Gough v. Davies,[3] three persons were partners as bankers, and were indebted to the plaintiff. One of the partners retired; a new

[1] Robinson v. Wilkinson, 3 Price, 538. [2] 2 Cr. & M. 617. [3] 4 Price, 200.

his liability, but the court[1] thought that there was abundant evidence to show that the plaintiff knew of the defendant's retirement, and a new trial was refused.

A partner who has retired may also be discharged by the conduct of the creditor, if he has been party or privy to any fraud in consequence of which the former has acted on the supposition that the claims of the latter were satisfied by the continuing partners.[2]

Closely allied to the subject which has just been discussed, is that which relates to the discharge in equity of the estate of a deceased partner from the liabilities to which he was subject as a partner at the time of his death. The position of the estate of a deceased partner, with reference to the question of discharge by reason of a creditor's dealings with the surviving partners, is very similar to the position of a retired partner. The same principles are applicable to both, and the authorities which are in point as regards the one, are so also as regards the other. The parallel between the two would be complete were it not that the estate of a partner who dies in the life-time of his copartners is liable for the joint debts of the firm in equity only; and there may be circumstances which will induce a court of equity to hold that estate discharged, although the same circumstances would not, in the case of a retiring partner, operate as a discharge at law,[3] and *vice versa*.[4]

It has been decided in equity that if a creditor of a firm knows of the death of one of the firm and continues to deal as before with the survivors he does not lose the remedy which he had against the estate of the deceased partner, unless there is evidence showing an intention to abandon the right of having recourse thereto for payment;[5] and an attempt by the creditor to obtain payment from the survivors is not sufficient evidence of such an intention. Thus, if he sues the survivors at law, and obtains judgment against them, this will not necessarily deprive him of his right in equity to obtain payment out of the estate of the deceased.[6] So, proving in bankruptcy against the estate of the new firm, is not, *per se*, sufficient to preclude the creditor from afterward having recourse to the assets of the dead partner.[7]

---

[1] Bolland, B., *dissentiente*.

[2] See Featherstone v. Hunt, 1 B. & C. 113, where, however, the fraud was not made out.

[3] See Ex parte Kendal, 17 Ves. 522 and 525.

[4] Jacomb v. Harwood, 2 Ves. Sr. 265.

[5] Winter v. Innes, 4 M. & Cr. 101, and see Devaynes v. Noble, Sleech's case, 1 Mer. 539; Clayton's case, id. 579; Palmer's case, id. 623; Braithwaite v. Britain, 1 Keen, 206.

[6] Jacomb v. Harwood, 2 Ves. Sr. 265.

[7] Sleech's case, 1 Mer. 570; Harris v. Farwell, 15 Beav. 31; but see Brown v. Gordon, 16 Bid. 302.

Even where a new partner has been introduced, a creditor of the old firm, who continues to deal with the new firm as he dealt with the old, and is paid interest by the new firm as if the debt was its own, does not thereby deprive himself of his right to be paid out of the estate of a deceased member of the old firm.[1] In the late case of Harris v. Farwell,[2] a banking firm consisting of three partners became indebted to a customer on a deposit note; one of them died, and the survivors took his son into partnership with them. The new partnership paid interest on the note for some time, and then became bankrupt. The plaintiff proved against the new firm for the amount of his debt, and was paid a dividend out of its estate. It was held that he had done nothing which precluded him from having recourse to the estate of the deceased partner.

On the other hand, if, after the death of a partner, a creditor of the old firm knows of the death, and does not take any steps to obtain payment from the estate of the deceased, if he lies by and allows that estate to be administered as if he had no claim upon it, and if he continues to deal with the surviving partners as if they and they alone were his debtors, in that case a court of equity will not assist the creditor in an attempt to resort to the assets of the deceased, and will hold those assets to have been discharged. Oakley v. Pasheller and Brown v. Gordon may be referred to as illustrating this doctrine.

In Oakley v. Pasheller [3] two partners, A and B, executed three joint and several bonds to secure repayment of money lent. A died and B took in C as a partner with him. An agreement was come to between A's executors and B and C, that the latter should take the assets and liabilities of the old firm, and indemnify A's estate from those liabilities. Of this the bond creditor appears to have had notice.[4] He was paid interest on his bond by the new firm, and received accounts from it in which the old debt and the debts contracted by the new firm were blended together. On two occasions the plaintiff had agreed to give and had given the new firm considerably further time to pay the bonds, but A's executors had no notice of this. Ultimately the bond creditor took from B and C an assignment of some policies as a collateral security for payment of the bonds, expressly reserving his rights against A's estate. It was, however, held that A's estate had been discharged from its liability from what had pre-

[1] Daniel v. Cross, 3 Ves. 277.

[2] 15 Beav. 31. It does not appear from the report when the customer first knew of the change in the firm.

[3] 10 Bli. (N. S.) 548, and 4 Cl. & Fin. 207.

[4] See 4 Cl. & Fin. 212, the marginal note states that he had not.

viously taken place. The court thought that A's estate had become, as it were, surety only for payment of the debt,[1] and that it had been discharged by the long indulgence granted by the creditor to the principal debtor.

In Brown v. Gordon,[2] the plaintiff deposited money with a banking firm consisting of three partners, A, B, and C. D afterward became a partner. A died, having made a will containing a trust for payment of his debts. After A's death his son, who was also his executor and residuary devisee and legatee, became a partner in the bank. Some time afterward B and C died. The bank had been continued, first, by B, C, D, and A's son, then by D, C, and A's son, and lastly by D and A's son; but it ultimately stopped payment, and the two surviving partners were adjudged bankrupts. Interest had been paid to the plaintiff by the successive firms, and the plaintiff's debt was proved in the Bankruptcy Court. On a bill filed for the purpose of obtaining payment out of A's estate, it was held that the plaintiff, by the neglecting for sixteen years to make any claim against the assets of the deceased, and by treating the successive firms as his debtors, had discharged the estate of the deceased, and that he could not be considered as a creditor of the deceased, so as to avail himself of the trust in the will for payment of debts.

In whatever way a creditor may have dealt with the surviving partners, he cannot be held to have adopted them as his sole debtors in respect of a demand arising out of a fraudulent transaction, of which he has been constantly kept in ignorance.[3]

Before leaving this subject, it may be useful shortly to review the effect of the numerous cases which have been noticed in the preceding pages. Those cases establish that:

1. An express agreement by the creditor to discharge a retired partner is not inoperative for want of consideration, as was held in Lodge v. Dicas,[4] for this case has, as to this point, been overruled by Thompson v. Percival.[5]

2. An adoption by the creditor of the new firm as his debtor does not by any means necessarily deprive him of his rights against the old firm.[6]

---

[1] See Rogers v. Maw, 4 Dowl. & L. 66.
[2] 16 Beav. 302.
[3] See Clayton's case, 1 Mer. 579.
[4] 3 B. & Ald. 611.
[5] 5 B. & Ad. 925.
[6] David v. Ellice, 5 B. & C. 196, E. C. L. R. 11; Thompson v. Percival, 5 B. & Ad. 925, E. C. L. R. 27; Heath v. Percival, 1 P. W. 682, and 1 Str. 403; Kirwan v. Kirwan, 2 Cr. & M. 617; Gough v. Davies, 4 Price, 200; Blew v. Wyatt, 5 C. & P. 397, E. C. L. R. 24; Sleech's case, 1 Mer. 539; Clayton's case, id. 579; Palmer's case, id. 623; Braithwaite v. Britain, 1 Keen, 206; Winter v. Innes, 4 M. & Cr. 101.

3. And it will certainly not do so if by expressly reserving his rights against the old firm he shows that by adopting the new firm he did not intend to discharge the old firm.[1]

4. And, by adopting a new firm as his debtor, a creditor cannot be regarded as having intentionally discharged a person who was a member of the old firm but was not known to the creditor so to be.[2]

5. But the fact that a creditor has taken from a continuing partner a new security for a debt due from him and a retired partner jointly, is strong evidence of an intention to look only to the continuing partner for payment.[3]

6. And a creditor who assents to a transfer of his debt from an old firm to a new firm and goes on dealing with the latter for many years, making no demand for payment against the old firm, may not unfairly be inferred to have discharged the old firm. If a jury finds that he has done so the court will not disturb the verdict;[4] and if the question arises in equity upon an attempt to have recourse to the estate of a deceased partner, the court will consider all the circumstances of the case and decline to assist the creditor if, upon the whole, justice to all parties so requires.[5] But the small number of cases in which relief has been refused, compared with those in which it has been granted, shows that the leaning of the court is strongly in favor of the creditor.

Of the doctrine of merger.

SEC. 601. Having now examined the mode in which a partner may be discharged from liability by reason of a substitution of some other person in his place with the creditor's assent, it is necessary to advert to a doctrine by which a partner occasionally finds himself discharged, simply because his creditor has obtained a security of a higher nature than that which he previously possessed.

If a person solely indebted enters into partnership with another and the two give a joint note or bill for the debt of the first, and the note or bill is not paid, the creditor is not precluded from demanding payment from his original debtor,[6] unless it can be shown that the bill or note

[1] Bedford v. Deakin, 2 B. & Ald. 210; Jacomb v. Harwood, 2 Ves. Sr. 265.
[2] Robinson v. Wilkinson, 3 Price, 538.
[3] Evans v. Drummond, 4 Esp. 89; Reed v. White, 5 id. 122.
[4] Hart v. Alexander, 2 M. & W. 484.
[5] Ex parte Kendal, 17 Ves. 522-5; Oakley v. Pasheller, 4 Cl. & Fin. 207; Brown v. Gordon, 16 Beav. 302.
[6] Ex parte Seddon, 2 Cox, 49; Ex parte Lobb, 7 Ves. 592; Ex parte Meinertzhagen, 3 Deac. 101; Ex parte Hay, 15 Ves. 4; Ex parte Kedie, 2 D. & C. 321.

was taken in satisfaction of the original demand.[1] So, if two partners are indebted on the partnership account, and one of them gives a bill or note for the debt, and that bill or note is dishonored, the creditor who took it will not be precluded from having recourse to both partners for payment,[2] unless it can be shown that he intended to substitute the liability of the one for the joint liability of the two.[3]

But when a creditor obtains from his debtor a security of a higher nature than he had before, the original debt is merged in the higher security, and can no longer be made the foundation of any action or suit, or of proof in bankruptcy or insolvency;[4] and this doctrine is as much applicable to joint as to several obligations. Consequently, if two partners are jointly indebted by simple contract, and one of them gives his bond for payment of the debt, the joint debt is at an end;[5] and if the creditor obtains judgment against one of the partners only, he loses his remedy against the others,[6] unless, perhaps, in the case where they are abroad, and cannot, therefore, be sued here with effect.[7]

With respect to obligations which are joint as well as several, there is more difficulty. A joint and several obligation, arising *ex delicto*, is extinguished by a judgment recovered against any one of the persons obliged;[8] but, as regards joint and several obligations arising *ex contractu*, although a joint judgment against all the persons obliged extinguishes the separate liability of each, for *nemo debet bis vexari pro eadem causa*, yet a judgment obtained against one of them only does not extinguish the separate liability of the others.[9] In order that this effect may be produced the judgment must be satisfied.[10]

Further, if several persons are jointly liable, and one of them afterward gives a separate security on which judgment is recovered against him, this will not merge the prior joint liability. In the leading case

---

[1] As in Ex parte Whitmore, 2 Deac. 365; Ex parte Kirby, Buck, 511; Ex parte Jackson, 2 M. D. & D. 146.

[2] Bottomley v. Nutall, 5 C. B. (N. S.) 122; Whitwell v. Perrin, 4 id. 412; Ex parte Hodgkinson, 19 Ves. 291; see, too, Ex parte Raleigh, 3 M. & A. 670.

[3] As the jury found was the case in Evans v. Drummond, 4 Esp. 89, and Reed v. White, 5 id. 122. Compare the cases in the last note.

[4] Higgen's case, 6 Co. 44 b.; Owen v. Homan, 3 Mc. & G. 378; Price v. Molton, 10 C. B. 561, E. C. L. R. 70; Shack v. Anthony, 1 M. & S. 572; but the original debt may be made the foundation of an adjudication of bankruptcy. Re Griffith, 3 De G. M. & G. 174.

[5] Basset v. Wood, 11 Vin. Ab. Exting. B. 8; and see Owen v. Homan, 3 Mc. & G. 407; Ex parte Hernaman, 12 Jur. 642.

[6] King v. Hoare, 13 M. & W. 494; Ex parte Higgins, 3 De G. & J. 33.

[7] See, as to this, Ex parte Waterfall, 4 De G. & S. 199. A colonial judgment creates no merger. Bank of Australasia v. Nias, 16 Q. B. 717.

[8] Brown v. Wooton, Cro. Jac. 73; Buckland v. Johnson, 15 C. B. 145; and see, as to the plea of another suit depending, Boyce v. Douglas, 1 Camp. 61.

[9] Ex parte Christie, Mon. & Bl. 352.

[10] Higgen's case, 6 Co. 46 a; King v. Hoare, 13 M. & W. 494; and see Drake v. Mitchell, 3 East, 251.

of Drake v. Mitchell,[1] three persons purchased a coal mine, and covenanted jointly to pay the purchase-money by installments. An installment being in arrear, one of the covenantors gave his own promissory note for part of the money due, and judgment was afterward recovered against him for the amount of the note in an action upon it. In a subsequent action on the covenant, brought against all three covenantors for the recovery of the installment in question, it was held that, as the note was not accepted in satisfaction of any part of the plaintiffs' demand, the judgment recovered on the note merely extinguished the right to sue on the note itself, and did not affect the liability on the covenant, so long as the judgment remained unsatisfied. The defendant who gave the note was in this case twice sued, viz., first, in respect of his separate liability on the note, and next, in respect of his joint liability on the covenant, but the liabilities being substantially different, the case is not in conflict with the rule *nemo debet bis vexari pro eadem causa.*

Notwithstanding the undoubted rule that a bond or judgment merges any simple contract debt in respect of which it may have been given or obtained, this rule only applies if the simple contract debt existed first in order of time, and if the specialty creditor is the same as the simple-contract creditor. So that if a bond is given or a judgment is obtained (under a warrant of attorney), as a security for future advances,[2] or if a simple contract debtor gives a bond or confesses a judgment to a trustee for his creditor,[3] in neither of these cases will there be any merger.

It must also be borne in mind that in equity the doctrine of merger does not apply to the same extent as at law; for in equity, a joint bond is given for a pre-existing joint and several debt, the bond will itself be treated as joint and several.[4]

Further, it is to be observed that merger does not, properly speaking, extinguish a debt; for, notwithstanding the fact that a debt is merged in a higher security, the merged debt is sufficient to support an adjudication of bankruptcy against the debtor.[5]

---

[1] 3 East, 251. See, too, Re Clarkes, 2 Jo. & Lat. 212; Ex parte Bate, 3 Deac. 358, where a joint and several debt was held not merged, so far as it was joint, by higher separate securities.

[2] Holmes v. Bell, 3 Man. & Gr. 213, and the note there.

[3] Bell v. Banks, 3 Man. & Gr. 258. In such a case, equity would probably follow the law, *ut res magis valeat quam pereat.*

[4] See *ante*, p. 295; Bishop v. Church, 2 Ves. Sr. 100 and 371; Simpson v. Vaughan, 2 Atk. 31; and see, as to a judgment, Jacomb v. Harwood, 2 Ves. Sr. 265.

[5] Re Griffiths, 3 De G. M. & G. 174, and the cases there cited.

Again, proof in bankruptcy against the estate of one partner in respect of a partnership debt is not equivalent to a judgment and does not preclude the proving creditor from afterward suing the solvent partners, and recovering from them what he may have failed to obtain in the bankruptcy."[1]

[1] Whitwell v. Perrin, 4 C. B. (N. S.) 412; Bottomley v. Nuttall, 5 id. 122.

CHAPTER XXV.

OF THE LIABILITY OF DECEASED PARTNER'S ESTATE.

SEC. 602. Remedy at law.
SEC. 603. Rule in Gray v. Chiswell.
SEC. 604. Partnership debt, several as well as joint, in equity.
SEC. 605. Rule in Devaynes v. Noble.
SEC. 606. Confirmed in Wilkinson v. Henderson.
SEC. 607. Rule carried still farther in Thorpe v. Jackson.
SEC. 608. Joint and several contracts.
SEC. 609. Rule in equity when partners enter into a joint security.
SEC. 610. Rule does not apply to all transactions—Sumner v. Powell.
SEC. 611. Partnership creditors, rights against a deceased partner's estate—Vulliamy v. Noble.
SEC. 612. Admission of survivor of representatives of a deceased partner—Braithwaite v. Brittain—Winter v. Innes.
SEC. 613. Subsequent dealings with the new firm.
SEC. 614. Acts in discharge of deceased partner's estate—Jacomb v. Harwood.
SEC. 615. Rule in Winter v. Innes.
SEC. 616. Payments made in case of decease of one of the partners—Devaynes v. Noble.
SEC. 617. Sleech's case—Clayton's case.
SEC. 618. Liability in case of continuance of firm under will of deceased.
SEC. 619. Creditors of new firm not entitled to pursue the estate.
SEC. 620. Ex parte Garland.
SEC. 621. Executor carrying on business liable for excess of authority.
SEC. 622. Rule in Wightman v. Townall.
SEC. 623. Consequences of death of a partner.
SEC. 624. Relative rights of executor and surviving partner.
SEC. 625. With reference to what occurred before death.
SEC. 626 Creditors may pursue estate in equity.
SEC. 627. Position of firm creditors as to individual creditors of deceased partner.
SEC. 628. Rule in Brett v. Beckwith.
SEC. 629. Substance of decree in such cases.
SEC. 630. Questionable whether both remedies can be pursued at once.
SEC. 631. With reference to what occurred after death.
SEC. 632. What acts of an executor impose liability upon assets of deceased partner.

SEC. 633 Cases illustrating.
SEC. 634. Effect of provision in will directing continuance of business.
SEC. 635. In the case of companies.
SEC. 636. Consequences as to separate creditors, legatees and next of kin of deceased partners.
SEC. 637. General rule as to separate creditors.
SEC. 638. Exceptions to the rule.
SEC. 639. When share of deceased is not got in.

Remedy at law.

SEC. 602. At law, upon the death of a partner, the legal remedies against him in respect of partnership contracts are extinguished, and the creditor being precluded from suing the representatives of the deceased, can maintain an action against the surviving partners only.[1] In equity, on the other hand, the creditor of a partnership may obtain payment of his debt out of the assets of a deceased partner, though under what principles, and under what modifications such relief will be granted, has not been established until late years. In the opinion of some judges, and particularly of Lord Eldon, a partnership creditor was permitted to receive satisfaction for his debt, out of the estate of the deceased partner, only *through the medium of the equities existing between the partners themselves*, those equities, so far as regards the interests of third parties, being these, that their joint debts should be satisfied out of their joint estate, but if that were insufficient, then subject to the claims of their separate creditors out

[1] The survivor and executor cannot be joined as defendants. Voorhees v. Baxter, 1 Abb. Pr. (N. Y.) 43; Welsh v. Speakman, 8 W.& S. (Penn.) 260; Tracey v. Suydam, 30 Barb. (N. Y.) 115; Voorhis v. Child, 17 N. Y. 357; Hedden v. Hedden, 1 Penn. St. 62. The action must be against the surviving partner alone, Osgood v. Spencer, 2 H. & G. (Md.) 133; Burgwin v. Harther, 3 N. C. 75; Davis v. Warrington, 5 Harr. (Del.) 147, and all actions at law must be brought in his name, as he alone is entitled to administer the affairs of the firm, control its assets, and collect the debts due it, Rice v. Richards, 1 Barb. (N. C.) Eq. 277; Wallace v. Fitzsimmons, 1 Dall. (Penn.) 248, and the executor or administrator of a deceased partner has no control over such choses in action, and a payment made to him is no defense to an action by the surviving partner, Wallace v. Fitzsimmons, *ante*, upon the death of one partner all property and debts of the partnership vest in the survivor, Barry v. Harris, 22 Md. 31, and an administrator who has notes belonging to the firm which he refuses to deliver up to the surviving partner is liable in trover to him therefor. Stearns v. Haughton, 38 Vt. 586. When the firm owns stock in a corporation, the surviving partner alone is entitled to vote thereon, Allin v. Hill, 16 Cal. 117; and until the affairs of the firm are settled, the probate court has no power to distribute the deceased partner's share in the firm assets. Stewart v. Burkhalter, 28 Miss. 396. In a word, the survivor has the full control of the assets and business without interference from the representatives of the deceased partner. Hull's Appeal, 40 Penn. St. 410; Ray v. Vilas, 18 Wis. 173; Shields v. Fuller, 4 id. 102; Daniel v. Stone, 30 Me. 386. And a court of equity will not interfere with his control unless he is dealing improperly with the business. Harrell v. Witts, 1 P. & D. Cas. 103; Evans v. Evans, 9 Paige's Ch. (N. Y.) 186.

of their separate estates proportionally. On the other hand, there was very high authority for holding that such a creditor had a right to proceed immediately against the representative of the deceased partner, upon the principle that in the consideration of a court of equity a partnership debt is several as well as joint. It became important to understand which of the two principles in question was the right one, when it was considered how differently they might affect the judgment of a court of equity, with regard both to the time and manner of administering the assets of the deceased partner. If, on the one hand, the creditor was to be considered as entitled to payment out of the deceased partner's estate, not because his contract with that partner continued as a several contract, but because that contract having ceased, he could only resort to that estate through the equities of the surviving partners; then it was clear that the creditor must wait till those equities were complete, that is to say, until an account should have been taken of the partnership transactions, and the joint estate ascertained; and in case of the insolvency or insufficiency of the joint estate, then until the separate estate of each partner should have been ascertained, and all the separate creditors paid. On the other hand, if, upon the decease of a partner, the creditor was to be considered a several as well as a joint creditor of the firm, it followed as a consequence that he was to receive his satisfaction immediately out of the estate of the deceased partner, and, perhaps, even *pari passu* with the separate creditors.

Rule in Gray v. Chiswell.

SEC. 603. When the first edition of this treatise was published, the weight of authority seemed to be in favor of the former of these two opinions; but as the courts have since upheld the latter, it becomes unnecessary to notice those cases upon which the exploded doctrine appears to rest.[1] Perhaps, however, an exception may be made in favor of the case of Gray v. Chiswell,[2] as showing the principle which Lord Eldon conceived to be applicable to this subject. In that case a bill was filed by the separate creditors of Chiswell, the late partner of Nantes, against the executrix and heir-at-law of Chiswell, for an account. The joint creditors of Chiswell & Nantes, who had proved their debts under a commission of bankrupt against Nantes, as surviving partner, went in[3] under an order, and proved their debts before

[1] Lane v. Williams, 2 Vern. 292; id. 519; Campbell v. Mullett, 2 Swanst. 576; Jacomb v. Harwood, 2 Ves. 265; Hankey v. Garrett, 1 Ves. Jr. 236; Ex parte Williams, 11 Ves. 3; Ex parte Kendall, 17 Ves. 514.

[2] 9 Ves. 118.

[3] By consent.

the Master. They then insisted upon their right to come in *pari passu* with the separate creditors of Chiswell against his separate estate. It was admitted that the joint estate was insolvent, and would pay only an inconsiderable dividend; and that the surviving partner having brought into the firm an inconsiderable sum, upon a final adjustment the joint estate would be greatly indebted to the separate estate. Upon the argument of the question, many authorities were cited in favor of the joint creditors, in which the court had rectified the joint bonds of partners by construing them several as well as joint, so as to constitute the bond creditor a separate creditor on the estate of the deceased partner. On the other hand, it was contended that these were all cases in which the bond had been made joint through fraud or mistake.[1] Lord Eldon — "Why, if the equity of the case gives the joint creditors as good a right as in bankruptcy, are they to have all this benefit before the separate creditors are satisfied? The cases of mistake, etc., differ in respect of the intention of the transaction, the intention originally to constitute a legal demand against the deceased man as well as the survivor. The decree goes upon the intention. What is now desired, not only does not effectuate the intention as conceived in law, but goes beyond it, as acted upon in equity. The intention implied in equity is only that, if the estates are insolvent, then the remedy is to be had against the deceased partner. But is the benefit of that to be had against those who have a separate credit upon each? That has never been said. In the cases that have been referred to, the court says the security should be according to the form in which it was originally intended; that the creditor had originally a right at law to be considered a separate creditor, provided he had the security intended; and then the court has always said a decree for such an equitable creditor is equal to a judgment at law. But there is this distinction, that you are there pressing for a creditor that which he could have enforced against the testator suing him alone at law, if the security had been rectified, and he had been alive; for the court would during his life have rectified the bond. He is not, therefore, put in a better situation than he would have been in if he had sued in the life of the debtor. But here you are giving him a suit against the assets of Chiswell alone, when he could not have sued Chiswell alone in his life. This, therefore, seems to go farther than any other case; and, I

[1] See Simpson v. Vaughan, 2 Ves. 101, cited; 2 Atk. 31; Thomas v. Frazer, 3 Ves. 399; Burn v. Burn, id. 573; Bishop v. Church, 2 Ves. Sr. 100, 371.

think, will not do. It is extremely difficult to say upon what the rule in bankruptcy is founded. But if the court aim at equality, it is extraordinary to say they shall have a better remedy in consequence of his death than if he had lived, and when, by reason of his death, the remedy at law is gone." His Lordship afterward said that, having thought very anxiously upon this case, his opinion was, that the separate creditors must take the separate estate, and the joint creditors the surplus, and the decree was framed accordingly.

It may perhaps be said that the case of Gray v. Chiswell is not an express authority in favor of the opinion which has been ascribed to Lord Eldon, and that the decision in that case might be supported consistently with the principle that a partnership contract is several as well as joint, the case in question merely deciding that, although the partnership creditor may be admitted in equity to receive payment of his debt out of the estate of the deceased partner, he must nevertheless, by analogy to the rule in bankruptcy, be postponed to the separate creditor of the deceased partner. The answer to this argument appears to be that Lord Eldon's decision, as reported, does not rest on those grounds alone, his language, both in that and other cases,[1] showing clearly that, in his opinion, the remedy of a partnership creditor against the deceased partner's estate was not immediate, but depended on the state of the account between the deceased and surviving partners.

Partnership debt several as well as joint in equity.

SEC. 604. But, whatever may have been the opinion of Lord Eldon upon this important subject, it is now established beyond controversy that, in the consideration of courts of equity, a partnership debt is several as well as joint,[2] and that, upon the death of a partner, the joint creditor has a right in equity to proceed immediately against the representative of the deceased partner for payment out of his separate estate, without reference to the question whether the joint estate is solvent or insolvent, or to the state of accounts amongst the partners.

---

[1] 17 Ves. 519. D. Lord Eldon: "Where parties think proper to enter into a joint, instead of a joint and several contract, though I am surprised that courts of equity have not left that to its fate as a joint contract, they have, I admit, said that there is a remedy against the assets of one deceased, if the survivors cannot pay. That must be, however, subject to many considerations."

[2] See *dicta* of Lord Loughborough, Stephenson v. Chiswell, 3 Ves. 566; Lord Brougham, Devaynes v. Noble, *post*, p. 930; Lord Mansfield, Rice v. Shute, Burr. 2611; DeGrey, C. J. Abbott v. Smith, 2 W. Bl. 947.

Rule in Devaynes v. Noble.

SEC. 605. The great case upon this subject is that of Devaynes v. Noble,[1] decided by Sir William Grant, and afterward, upon appeal from his decree, by Lord Brougham. By the decree made on the hearing of that cause it was referred to the Master to take an account of what was due, at the death of Devaynes, from the partnership of Devaynes & Co., to the plaintiffs, and all such other persons as were creditors of the partnership at the death of Devaynes, and also of what was due, at the time of making the decree, from the partnership to such creditors, and to inquire whether such creditors, or any and which of them, continued to deal with the surviving partners after the death of Devaynes, and what sums of money were paid by the surviving partners to such creditors, respectively, from the death of Devaynes to the bankruptcy, and what had since been received by them, respectively; and, also, whether such creditors, or any and which of them, had, by such subsequent dealings, released the estate of Devaynes from the payment of their respective debts, or what (if any thing) remained due in respect thereof. Under this decree, the Master made his separate report, dated the 15th March, 1815, in which he stated the claims of different classes of the partnership creditors at the death of Devaynes, and the various dealings which had since taken place between those creditors and the surviving partners, and his opinion, as generally applicable to all classes of the creditors, was that they had a right to resort to the estate of Devaynes for the balance due to them at the time of his death, after deducting payments made to them by the surviving partners. The representatives of Devaynes excepted to this report, on the general ground, that, by the subsequent dealings, the creditors had released his estate, and assumed the surviving partners as their debtors. Sir William Grant overruled the exceptions. In the course of his judgment in one of the cases submitted for his opinion,[2] his Honor took occasion to comment upon the general equity of the joint creditor to receive payment from the deceased partner's estate, observing that courts of equity had adopted the rule of the law of merchants, that a partnership contract is several as well as joint, and upon this principle his Honor in the principal case held that the joint creditor might have immediate recourse to the estate of the deceased partner, without regard to the relative position of the deceased and the surviving partners, in respect of the general accounts of the partnership. And

[1] 1 Mer. 529; 2 Russ. & M. 495. [2] Sleech's case, 1 Mer. 568.

his Honor proceeded on the same principle in the succeeding case of Sumner v. Powell.[1]

The exceptions to the Master's report in Devaynes v. Noble having been overruled, as above stated, the representatives of Devaynes appealed against the decree, submitting, "that it is contrary to the principles and practice of this court to give relief to joint creditors of a partnership in respect of their joint debts, out of the estate of the deceased copartner in a case in which it is not alleged and proved by such joint creditors, that they had exercised their legal remedy against the surviving partners, or in a case in which no proof is given by such joint creditors that the joint estate of the copartners is insufficient to pay the joint debts of the partnership,[2] or in a case in which such joint creditors seek relief against the separate estate of one copartner without seeking relief against the separate estates of the other copartners.[3]

The appeal was twice heard by Lord Eldon. His Lordship came to no decision on the subject, though he observed that it was too late to doubt that in certain cases the court would apply the assets of the predeceased partner, though it was a very unsettled thing, when and under what limitation the court was to apply those assets with a view to the question of how the creditor was to be paid, regard being had to the circumstance that there were other persons who were debtors.

---

[1] 2 Mer. 37.

[2] Sir H. Seton observes that since the above appeal an inquiry is sometimes directed as to the joint estate. In Fisher v. Farrington the following clause formed part of the minutes of the decree: "Let the Master inquire whether the joint estate of the said firm of B (the deceased partner) and M was, or not, sufficient for the payment of the joint debts due from the said firm at the death of the said testator; such inquiry to be without prejudice to any question as to the rights of the joint creditors, in case it shall appear that at the decease of the said testator the said joint estate was sufficient for the payment of the said joint debts." Fisher v. Farrington, Seton on Decrees, 239.

[3] The prayer of the petition was, that the said causes might be reheard, that the bill filed by Sir T. Baring and Sir F. Standish might be dismissed, and that the decree of 2d March, 1812, and orders might be discharged; otherwise, that the said decree might be varied, "by directing the master to inquire and certify whether the joint estate of the said firm of Devaynes, Dawes, Noble & Co. is sufficient to pay the joint debts of that partnership. And in case the said Master shall find that the said joint estate is sufficient for the payment of the said debts, then, that the said bill may be dismissed with costs. And in case the said Master shall find that the said joint estate is insufficient for the payment of the said debts, then, that the said Master may be directed to take an account of the joint estate of the said firm of Devaynes, Dawes, Noble & Co., possessed by the said defendants, Lestock Wilson, John Morris, and Joseph Down, the assignees of the said John Dawes, William Noble, Richard Henry Croft, and Richard Barwick, and also an account of the separate estates of the said John Dawes, William Noble, Richard Croft, and Richard Barwick, and that in the meantime all proceedings under the said order of the 1st day of June, 1820, and the 3d day of August, 1820 (*orders for payment of the joint creditors out of the assets of Devaynes*), may be suspended."

The case was afterward elaborately argued before Lord Lyndhurst, who gave no decision.

Ultimately the case was heard by Lord Brougham, who dismissed the appeal. His Lordship took the same view of the equity in question as Sir William Grant, considering the partnership creditor to have an absolute right, without any modification, to resort to the estate of the deceased partner. In the course of his judgment, his Lordship referred to the case of Sumner v. Powell as materially bearing on the question then before him, and he observed that in the last-mentioned case Sir William Grant had referred to the case of Devaynes v. Noble, in a way to show that it had not been lightly dealt with by his Honor, but was decided upon mature deliberation, and after a full examination of all the authorities.

Rule confirmed in Wilkinson v. Henderson.

SEC. 606. The case of Devaynes v. Noble, so far as relates to the subject now under discussion, was recognized and acted upon by Sir John Leach in Wilkinson v. Henderson.[1] The plaintiff was a creditor of the partnership firm of Shepherd & Hartley, and Shepherd having died, the bill was filed by the plaintiff on behalf of himself and all other the joint creditors of Shepherd & Hartley, against the executors of Shepherd, and against Hartley, the surviving partner; and it prayed payment of the partnership debts out of the estate of Shepherd. On the part of the defendants, the executors of Shepherd, it was objected that no decree could be had for payment of the partnership debts out of the estate of Shepherd, inasmuch as it did not appear that Hartley, the surviving partner, was insolvent, but per Sir John Leach, "All the authorities establish that, in the consideration of a court of equity, a partnership debt is several as well as joint. The doubts upon the present question seem to have arisen from the general principle that the joint estate is the first fund for the payment of the joint debts, and that the joint estate vesting in the surviving partner, the joint creditor, upon equitable considerations, ought to resort to the surviving partner before he seeks satisfaction from the assets of the deceased partner. It is admitted that if the surviving partner prove to be unable to pay the whole debt, the joint creditor may then obtain full satisfaction from the assets of the deceased partner. The real question then is, whether the joint creditor shall be compelled to pursue the surviving partner in the first

[1] 1 Myl. & K. 532. In this case the observations contained in the first edition of this treatise are embodied in the speeches of the counsel on each side.

instance, and shall not be permitted to resort to the assets of the deceased partner, until it is established that full satisfaction cannot be obtained from the surviving partner; or whether the joint creditor may, in the first instance, resort to the assets of the deceased partner, leaving it to the personal representatives of the deceased partner to take proper measures for recovering what, if any thing, shall appear upon the partnership accounts to be due from the surviving partner to the estate of the deceased partner. Considering that the estate of the deceased partner is at all events liable to the full satisfaction of the creditors, and must first or last be answerable for the failure of the surviving partner; that no additional charge is thrown upon the assets of the deceased partner by the resort to them in the first instance, and that great inconvenience and expense might otherwise be occasioned to the joint creditors; and, further, that according to the two decisions in Sleech's case in the cause of Devaynes v. Noble, the creditor was permitted to charge the separate estate of the deceased partner which in equity was not primarily liable, as between the partners, without first having resort to dividends, which might be obtained by proof under the commission against the surviving partner, I am of opinion that the plaintiff is entitled in this case to a decree for the benefit of himself and all other joint creditors, for the payment of his debt out of the assets of Shepherd, the deceased partner.

Rule carried still further in Thorpe v. Jackson.

SEC. 607. The principles upon which the case of Wilkinson v. Henderson was decided were carried to the very fullest extent in that of Thorpe v. Jackson,[1] in which it was held that every joint loan, whether contracted in relation to mercantile transactions or not, is in equity to be deemed joint and several. In that case several persons, who did not appear to be partners in trade, contracted a loan on a joint banking account with the Northern & Central Bank. One of the joint debtors, Edmund Hamer, having died, a bill was filed by the bank against his personal representatives, and against the surviving joint debtors, praying an account and payment of what might be found due on the banking account out of Hamer's assets. Only one of the surviving joint debtors was alleged to be insolvent, and no relief was prayed against any of them. On demurrer to the bill by Hamer's executors, it was argued on their behalf that no such equity as that alleged by the bill existed, as against the estate of a deceased joint debtor who

[1] 2 You. & Coll. 553; and see Braithwaite v. Britain, 1 Keen, 206.

had not been a partner in trade, the rule as to the severalty of a partnership contract having arisen entirely from the *lex mercatoria*. That if, however, such an equity did exist, it could not be administered until all the surviving joint debtors had been shown to be insolvent, and that Wilkinson v. Henderson, in which the contrary had been decided, was at variance with all the authorities. But Mr. Baron Alderson overruled the demurrer, his Lordship, after adverting to the observation of Lord Eldon, that a man who has chosen to take the joint contract of several, though at law his security is wearing out as each of his debtors dies, yet in equity may resort to the assets of a deceased debtor, observed, that in this proposition he could find no trace of the distinction set up in the course of the argument that such debt must be a mercantile debt incurred by joint traders, nor could he conceive why it should be so, though the question had most frequently arisen in such cases. "It is said," added his Lordship, "that in Sleech's case Sir W. Grant has decided upon the distinction now contended for. I do not apprehend this to have been the case. He says, indeed, that by the mercantile law a partnership contract was several as well as joint, and then he adds that this may probably be the reason why courts of equity have considered joint contracts of this sort (that is, contracts joint in form) as standing on a different footing from others. I conceive, therefore, that partnership trading debts are only one, and that the most frequent case of the general rule, which is, that wherever a court of equity sees that in a contract, joint in form, the real intention of the parties is that it shall be joint and several, it will give effect to such intention. Now, I think that a contract for a loan of money, giving to the creditor the benefit of the security of several persons, is of that description. Here it is a loan of money by bankers to certain persons, their joint customers. Is it not obviously the intention of both parties that the property of all shall be responsible for the money thus obtained? In the case of Simpson v. Vaughan, Lord Hardwicke, upon this obvious intention, corrected the mistake in the joint bond. Then the question arises, whether this equity exists until after all the surviving contractors have been found incapable of paying the amount. I think that question concluded by the case of Wilkinson v. Henderson, to the reasons of which I fully accede."

We ought not to conclude this subject without adverting to the question whether, when a partnership creditor has obtained a decree in equity for payment of his debt out of the estate of the deceased

partner, he is entitled to receive payment *pari passu* with the separate creditors of that partner. If this point were decided on principle alone, and without reference to any supposed analogy between the practice in the courts of equity and the practice in bankruptcy, it seems clear that the partnership creditor, as resting on his separate contract, would have a right to come in competition with the separate creditors. On the other hand, the cases of Gray v. Chiswell,[1] and Cowell v. Sikes,[2] tend to show that, by analogy to the rule in bankruptcy, the partnership creditor will in such case be postponed to the separate creditors, unless there be no joint estate. In Thorpe v. Jackson [3] the joint creditors did not attempt to compete with the separate creditors.

[1] 17 Ves. 519
[2] 2 Russ. 191.
[3] 2 Y. & C. 559.

Remedy against the estate of deceased partner.— Some controversy existed formerly in England, whether a creditor of a firm might in equity claim satisfaction of his debt against the firm, out of the estate of a deceased partner. But it has been finally determined that such a bill could be maintained. In this country there seems to be a great diversity of decisions on this question. The statutes of various States provide for the proving of claims against the estate of a deceased person before an officer designated for that purpose. And it is usually necessary to establish claims against the estate within a certain time in order to receive a dividend or payment of the same. In such a case it would be necessary, in order to secure the claim against a deceased partner, in case of the insolvency of the firm to which he belonged, to establish it before the proper officer within the time provided by law.

In the United States courts there seems to be a diversity of decisions, in reference to the partnership creditors' rights in equity, to claim satisfaction out of the deceased partner's estate. Nelson v. Hill, 5 How. 127; Murrill v. Neil, 8 id. 414. See, also, Randolph v. Daly, 15 N. J. Eq. 313; Creswell v. Blank, 3 Grant's Cas. (Penn.) 320; Moore's Appeal, 34 Penn. St. 411. And in some of the States at least the ground for equitable jurisdiction in such cases is made to depend upon the circumstances connected with the claim, such as the insolvency of the firm, or other grounds for the exercise of equitable interference. Thus, in New York, it has been held that no action will lie against the personal representatives of the deceased partner so long as any other members of the firm are living, nor until the liability of the latter to pay the debt has been legally ascertained or clearly shown. Tracy v. Suydam, 30 Barb. (N. Y.) 110. See, also, Voorhees v. Baxter, 1 Abb. Pr. (N. Y.) 43; 18 Barb. (N. Y) 592; 17 N. Y. 354; Dubois Case, 3 Abb. Pr. (N. Y.) 177. And in Georgia a plea of assets of the firm sufficient to satisfy the claim of the firm creditor, if properly signed and verified, will be good, and if established, defeat the claim of satisfaction out of the estate of a deceased partner. Daneil v. Townsend, 21 Ga. 155. See, also, Thornton v. Bussey, 28 Ga. 302; Tombs v. Hill, id. 371. So, in Illinois, it is held that before resort can be had to the separate estates of the individual partners, to pay partnership debts, the partnership estate must be exhausted. Morrison v. Kurtz, 15 Ill 193; Moline, etc., Co. v. Webster, 26 id 233. But see Pahlman v. Graves, id. 405.

The general doctrine in this country may be said to be that if a creditor resorts to equity for the satisfaction of a claim against a firm out of the assets of a deceased partner's estate, he must conform to the recognized principles of equity applicable to such cases. And he would generally be required to show, either a failure to recover his claim against the survivor, or to satisfy the same out of the partnership assets, owing to it insolvency. Meyer v. Thornburgh, 15 Ind. 124; Lewis v. Conrad, 11 Iowa; Pearson v. Keedy, 6 B. Monr. (Ky. 128; Stater v. Caroll, 2 Sandf. (N. Y.) Ch. 359; Lawrence v. Trustees, 2 Den. (N. Y.) 577; Voorhees v. Child, 17 N. Y. 354; Copcutt v. Merchant, 4 Bradf. (N. Y.) 18.

Joint and several contracts.

SEC. 608. The principle that a joint loan is to be considered in equity as joint and several might seem to lead to the conclusion that where joint debtors, not being partners in trade, have entered into a joint bond or joint covenant for payment of their debt, a court of equity would rectify the instrument by construing it several, although there might be no evidence of fraud or mistake in framing it. No general proposition, however, on this subject can be maintained; because the fact of joint debtors giving a joint security might, under some circumstances, rebut the presumption of their several liability in equity.[1] Probably, in deciding on a case of this nature, the courts would be disposed to inquire whether the instrument had been executed at the time when the debt was contracted, or had been given as a security for a bygone debt; for on these circumstances might depend the question, whether the debt was or was not measured by the strict terms of the covenant.

Rule in equity, when partners enter into a joint security.

SEC. 609. But where partners in trade enter into a joint security for the payment of moneys due from the partnership, courts of equity will rectify the intrument by construing it several as well as joint; the obligation to pay, independently of the instrument, being several as well as joint, and the courts presuming that it was the intention of the parties to carry that obligation into full force. If it were otherwise, the instrument would be the means of diminishing the security of the creditor.

This mode of dealing with joint instruments executed by partners has long been applied to the case of partnership notes,[2] upon the ground that, though the instrument was joint, the debt was the debt of each partner. Where, however, the partnership debt has been secured by the joint bond of the partners, courts of equity, in rectifying the bond, have taken into their consideration, not merely the presumed nature of the debt, but the fact of positive mistake or fraud in framing the instrument. The authorities, however, seem clearly to establish that all joint securities entered into by partners on the partnership account, whether under seal or otherwise, and although there may be no evidence of mistake or fraud in framing the instrument, will in equity be considered several as well as joint, and will be rectified accordingly. Thus, in Simp-

[1] See Sumner v. Powell, *infra*.
[2] Lane v. Williams, 2 Vern. 292; Jaccomb v. Harwood, 2 Ves. Sr. 265.

son v. Vaughan,[1] where a bill was brought by the executor of the obligee of a bond given by two joint debtors, for the purpose of having payment out of the estate of one of the debtors, Lord Hardwicke, though he adverted to the fact of mistake in drawing up the bond, also took notice that the debt arose from the contract itself; and that, if there was any defect in the contract, the court would resort to what was the principal intention of the parties, that they should be severally and jointly bound. And upon these considerations his Lordship rectified the instrument. Again, in Bishop v. Church,[2] where money was borrowed by partners on their joint bonds, although Lord Hardwicke doubted at first whether it sufficiently appeared that the bonds were intended to be separate as well as joint, yet, when he found that the money had been borrowed in the course of trade as partners, he declared the bonds valid as against the heir and executor of the deceased partner. And the principles of these decisions have been recognized and approved in succeeding cases.[3]

Rule does not apply to all transactions —Sumner v. Powell.

SEC. 610. But although in rectifying joint securities given by partners in trade, courts of equity would look to the fact of the obligors being partners as evidence of their intention to be severally bound, yet it by no means follows that every joint instrument executed by partners in relation to the partnership transactions shall be considered several as well as joint. In Sumner v. Powell,[4] one of several partners died. Instead of winding up the affairs of the partnership by taking a general account, and satisfying all the claims upon the firm, his executor, S, and the surviving partners entered into an arrangement by which the former received what was estimated to be his testator's share of the joint estate, he releasing to the other partners all interest in tne residue. S likewise received from the surviving partners a joint covenant of indemnity against the debts of the old partnership. W, one of the surviving partners, afterward died, and the others became bankrupt. S, having been compelled to pay a partnership debt, insisted that he had a right to be repaid out of W's estate, and that, to enforce this demand, the joint covenant of indemnity ought to be construed several. But Sir William Grant held the contrary, and dismissed the plaintiff's bill, though without

[1] 2 Atk. 31; 2 Ves. Sr. 101; and see Primrose v. Bromley, 1 Atk. 89.
[2] 2 Ves. Sr. 100, 371.
[3] Orr v. Chase, 1 Mer. 729; Thorpe v. Jackson, *supra*.
[4] 2 Mer. 30. The obligations of partners are in most of the States joint and several.

costs. "When the obligation," observed his Honor, "exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived. A partnership debt has been treated in equity as the several debt of each partner though at law it is only the joint debt of all. But there, all have had a benefit from the money advanced or the credit given, and the obligation to pay exists independently of any instrument by which the debt may have been secured. So, where a joint bond has, in equity, been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It was not the bond that first created the liability to pay. But, in this case, the covenant is purely matter of arbitrary convention, growing out of no antecedent liability in all or any of the covenantors to do what they have thereby undertaken. Why was Mr. Sumner's share of the partnership estate to remain unaffected by any claims by which that estate might afterward be diminished? There was no equity that entitled him to demand from the other partners an engagement to that effect. But they are contented to give him a covenant of indemnity. As it is only a joint covenant that is given, how can I say that it is any thing more than a joint covenant that was meant to be given? It is not attempted to be shown that there was any mistake in drawing the deed, or that there was any agreement for a covenant of a different sort. There is nothing but the covenant itself by which its intended extent can be ascertained. There is no ground, therefore, on which a court of equity can give it any other than its legal operation and effect."

Partnership creditors, rights against a deceased partner's assets — Vulliamy v. Noble.

SEC. 611. It is obvious from what has preceded, that the partnership creditor has a right to receive payment of his debt out of the assets of the deceased partner to the full amount of his demand against the original firm, and that, although the demand may arise from a fraud to which the deceased was no party.[1]

In Vulliamy v. Noble,[2] stock was transferred to a partner in a banking-house, by way of security for money borrowed of the firm

[1] Oldaker v. Lavender, 5 Sim. 239.

[2] 3 Mer. 593, and see Clayton's case, 1 Mer. 572; Ward's case, id. 624; Houlton's case, id. 616. Where stock has been misapplied in the manner above mentioned, the creditor may elect to consider the proceeds of the stock as a debt due from the deceased partner's estate, or to have the stock specifically replaced. Baring's case, 1 Mer. 611.

by one of their customers. The debt was subsequently discharged, but by consent the stock was not retransferred. The stock was afterward fraudulently disposed of. Then one of the partners died, and after his decease the remaining partners became bankrupt. Lord Eldon held the creditor entitled to have the remaining stock transferred to him, to receive the residue of his debt, if possible, out of the estate of the bankrupt partners, and to go against the deceased partner's estate for the deficiency. "It cannot," said Lord Eldon, "be made a question that a deceased partner's estate must remain liable in equity, until the debts which affected him at the time of his death have been fully discharged. There are various ways in which the discharge may take place, but discharged they must be before his liability ceases."

Admissions of survivor or representatives of a deceased partner—Braithwaite v. Britain—Winter v. Innes.

SEC. 612. It seems not to have been expressly determined as between the surviving partner and the representatives of the deceased partner, and *vice versa*, to what extent the acts or admissions of these parties respectively shall operate against the other so as to take a contract made with the partnership in the life-time of the deceased partner out of the Statute of Limitations. It is apprehended, however, that the strict rule of law on which the cases of Atkins v. Tredgold and Slater v. Lawson[1] depended, and by which an admission by a joint contractor or his representatives has no effect against the statute after the joint contract has been severed by death, will not apply in the case now under consideration. In Braithwaite v. Britain,[2] the bill was filed by a creditor of a banking firm against the representatives of John Britain, deceased, who was a partner in the bank, and against the surviving partners, praying for an account and payment of the plaintiff's deposits. John Britain died in March, 1824, and the bill was not filed till April, 1833, but it appeared the plaintiff received from the surviving partners several small sums on account in the course of the years 1827, 1828, and 1829. It was contended that these payments would not take the case out of the Statute of Limitations as against John Britain's estate, and the cases at law which have been already noticed, were cited in support of that proposition. Lord Langdale, M. R., however, seems to have dissented from that proposition, though he declined to decide the case, except upon its special

[1] 2 B. & C. 23. [2] 1 Keen, 206.

circumstances. He said: "On this occasion it is not necessary to determine the effect of the statute in barring claims against the estate of a deceased partner, in cases not attended by the peculiar circumstances belonging to this case. But considering that in cases of this kind the creditor of a partnership has a right to avail himself, not only of the nature of the contract, but also of the equities subsisting between the parties; that the surviving partners may, as to past transactions (in respect to which they are subject to liability in common with the estate of the deceased partner), be not unreasonably considered as acting not only for themselves, but also on account of the estate of the deceased partner; that the demand was clearly kept up against the surviving partners; that one of the surviving partners was one of the executors of the deceased partner, acting as such, and also one of the legatees of the interest of the deceased partner in the concern, and that the testator had made charges on his real estate for the payment of his debts, I think that the case, considering all its circumstances, does not fall within the operation of the statute, and is not governed by the legal consideration on which the cases of Atkins v. Tredgold and Slater v. Lawson were decided.

In Winter v. Innes,[1] Lord Cottenham, in adverting to this point, said: "When the simple case shall occur of the representatives of a deceased partner setting up the Statute of Limitations against a claim by a creditor of the firm, it will be to be considered whether such a defense can prevail whilst the surviving partner continues liable, and the estate of the deceased partner continues liable to contribution at the suit of the surviving partner. If the equity of the creditor to go against the estate of the deceased partner is founded upon the equity of the surviving partner against that estate, it would seem that the equity of the creditor ought not to be barred, so long as the equity of the surviving partner continues, as that would be to create that circuity which it is the object of the rule to prevent."

Subsequent dealing with the new firm.

SEC. 613. Let us now proceed to consider by what means and by what degrees the estate of the deceased partner may be relieved or discharged from the partnership debts due at his death by the subsequent dealing of the creditors with the surviving partners. And here it may be premised that the estate of the deceased partner has this advantage over that of a retiring partner, that, in order to free it from future liability, it is not necessary to give notice to the creditors of the dissolu-

[1] 4 Myl. & Cr. 111.

tion of the firm as to such deceased partner. Hence a court of equity will not restrain the surviving partners from using the name of a deceased partner in the new firm.[1] There is, however, an exception to this rule regarding notice in the case where one of the surviving partners is executor of the deceased partner. It seems that in such case, in order to exonerate the testator's estate, due notice ought to be given to the creditors of the firm of the testator's death, because the executor partner has power to bind such estate.[2]

Acts in discharge of the deceased partner's estate—Jacomb v. Harwood.

SEC. 614. The same acts of the creditor which operate in discharge of the retiring partner will be equally effectual in favor of the deceased partner's estate. Therefore, if, in respect of his claim on the original partnership, the creditor take the joint security of the new firm, at the same time relinquishing the securities of the old firm, and *a fortiori*, if there be express evidence of his receiving a consideration for abandoning his original rights, the deceased partner's estate will be absolved from liability on account of the debt.

On the other hand, the taking the separate security of the surviving partner will not, *per se*, be evidence of an intention to relinquish the remedies against the original firm, more especially where the original securities are retained. This position seems clearly established by the case of Jacomb v. Harwood,[3] though, in fact, the decision proceeded on another ground.[4] Gibson and Sutton were partners in the trade of scriveners and bankers. The plaintiffs each held a promissory note of Gibson and Sutton. Gibson died. For three years after his death Sutton continued to pay interest on the notes. After that the two plaintiffs separately called on Sutton for a further security than those bare notes, and, therefore, judgment was entered up in an action against him, not as an executor of Gibson, but as a surviving partner, for a partnership debt. That judgment was defeasanced by an instrument signed by the plaintiffs as to their respective demands, agreeing that no execution should be taken on either of these judgments until such a time. In that agreement it was particularly

[1] Webster v. Webster, 3 Swanst. 490, n.

[2] Vulliamy v. Noble, 3 Mer. 614; and see Whale v. Knight, 4 T. R. 627.

[3] 2 Vez. 265.

[4] Sutton had been appointed executor of Gibson, and in that character had, for the purpose of satisfying the judgment, mortgaged part of a leasehold estate, which was the separate property of Gibson. The bill prayed for a sale of such mortgaged premises, and payment to the plaintiffs of their principal, interests and costs, and Sir John Strange decreed according to the prayer of the bill, considering that such mortgage by the executor partner was valid and ought to be enforced in favor of the partnership creditors.

inserted, that these judgments thus obtained by the two plaintiffs should not hinder either of them from any remedy they might be entitled to in a court of equity against Gibson's estate or effects, if they were not otherwise paid or discharged. Sir John Strange: "If these judgments were obtained against him as surviving partner on foundation of a suit in the life of the two partners, no doubt but that will be, at law, an extinguishment of any remedy the party might have on the notes in a court of law, for *transit in rem judicatam*, it would be the same in case of a bond had that been given instead of a judgment, it would be at law an extinguishment of the simple contract debt, yet it would be a partnership debt on the judgment still. But this appears to be an action against him as surviving partner, and, therefore, I do not know (though it may be an extinguishment of the demand on the notes in any action against him or them), whether this may be set up as a variation of the security, that the partnership is discharged (as it certainly is as to any action on the notes), and that it is not a partnership debt. I do not see why I am not to consider it still as a partnership debt only bettered by the security being converted to a judgment from a common note. The plaintiffs were originally entitled to these sums on the note; one partner dies, the other is sued as a partner and judgment obtained against him. I should strongly incline to think that, notwithstanding that judgment, it still continues a partnership debt, being obtained as surviving partner."

Rule in Winter v. Innes.

SEC. 615. And where no fresh security is taken from the surviving partner for a partnership debt, the motives of the creditor in continuing his dealings with the surviving partner will be taken into consideration before it can be decided that such subsequent dealings amount to an acceptance of the sole security of the surviving partner in the room of the joint security of the firm. In Winter v. Innes,[1] it appeared that Mr. Winter for some years previous, and up to the time of his death, carried on the business of a West India merchant, in partnership with John Innes. At the death of Winter, which happened in 1824, a sum of 37,748*l.* was due from the partnership to Alexander Baillie, who did not at that time call for payment of his debt, but continued to deal with Innes until 1833, when Innes became bankrupt. The bill having been filed by persons claiming under

[1] 4 Myl. & Cr. 101.

Winter, for the purpose of having the partnership accounts taken, one question in the cause was, whether by reason of the transactions between Baillie and the surviving partner Innes, the debt of 37,748*l.* was to be considered as remaining a partnership debt, so as to entitle Baillie to receive payment out of the estate of Winter. It appeared that Baillie was induced so to leave his property in the hands of the house, partly, as it seemed, from kindness toward Innes, but principally from a desire not to injure the interests of the family of Winter, who was his friend. It was also shown that Baillie always looked to the settlement of Winter's affairs, and the realization of his property, as the means by which, and the time at which his debt was to be paid; Innes, in soliciting his forbearance, continually urging that, if payment of the debt were insisted upon, a forced and premature sale of the property would be the necessary consequence, from which much injury would arise to the family. Lord Cottenham, in giving judgment in the cause, said, that without the evidence which has just been stated, the case would be simply that of continuing the account with the surviving partner without requiring payment of the balance for eight years and three months, namely, from November, 1824, the time of Winter's death, to February, 1833, the time of Innes' bankruptcy, but that this evidence was very important upon the question, whether the creditor had substituted the individual credit of the surviving partner for the joint liability of the firm. That in this case there was not only no evidence of any intention to abandon the original claim against the partnership and to adopt the individual responsibility of the surviving partner in its stead, but the total absence of any object or consideration for so doing, and conclusive evidence that the principal object of the forbearance was not to press upon or prejudice the estate of the deceased, of whose will the creditor was himself a trustee and executor, though he did not prove. That under these circumstances it would be extraordinary, if any authorities could be found to show that the remedy against the deceased partner's estate was gone. His Lordship then, after adverting to some of the cases at law,[1] in which a new security had been given to the creditor by the continuing partner, and yet it had been left to the jury to say whether it was given in satisfaction of the original joint debt, proceeded to observe, that here there was no new security, and no evidence of any intention to release the estate of Mr. Winter, but the contrary, and therefore, if the cases in equity against

[1] See Thompson v. Percival, 3 N. & M. 167; *ante*, 825.

the estates of deceased partners were to be regulated by the same principles as governed courts of law upon the retirement of partners, there could be no doubt of the right conclusion in the present case. His Lordship ultimately declared that the debt in question was to be considered as still due and owing from the partnership, and not to have been assumed by John Innes, so as to discharge the estate of the testator.

The conclusion to be drawn from this case is, that where a person continues to deal with a surviving partner, but receives no consideration for accepting that partner's sole security, and has an object in retaining his money in the house independent of any advantage accruing to himself, that person is not to be taken as having relinquished the original security of the house. And it seems clear that his receiving interest from the surviving partner for the debt, would not discharge the estate of the deceased partner.[1]

Payments made in case of decease of one of the partners — Devaynes v. Noble.

SEC. 616. In *cash accounts current*, the balance due to the creditor at the death of a partner will be diminished by the subsequent payments made by the new firm to the creditors. We have already, in the case of retiring partners, had occasion to examine this mode of calculating the reduction of the joint creditors' debts under accounts current, and, therefore, a very short notice of this subject will here suffice.

In the case of Devaynes v. Noble,[2] so frequently referred to, Devaynes, Dawes, Noble, Croft and Barwick, were bankers, and partners, under the firm of Devaynes, Dawes, Noble & Co.; Devaynes died, and, from that period, the surviving partners continued to carry on business as before, under the same firm, without opening any new books, or making any rest in their accounts; and the accounts between them and the representatives of their deceased partner were not made up when the surviving partners became bankrupts. A commission of bankrupt having issued against them, a bill was filed by certain joint creditors of the firm of Devaynes & Co., on behalf of themselves and all other such creditors, for an account of the assets of Devaynes and for a decree to admit the joint creditors to have the benefit of his assets after his separate debts were paid, and praying that the dividend under the commission might be ordered to be postponed until after the decree should have been had in the cause. Upon the hear-

[1] Daniel v. Cross, 8 Ves. 277.

[2] 17 Ves. 514; 1 Mer. 529.

ing of certain exceptions to the Master's report in this cause, the claims of the several creditors, being various in their nature, were distributed in various classes. With regard to those creditors who had running accounts with the firm as their bankers, the main question was, how far the balance due to them at Devaynes' death was affected by the subsequent payments made to them by the new firm. Whether such subsequent payments, in default of any specific appropriation at the time of payment by either debtor or creditor, could be applied in the gradual discharge of such balance, or whether the creditor had power, at any time after payment, to make a specific appropriation, so as to leave the entire balance due at Devaynes' death undischarged, and still payable out of his assets. Sir William Grant, as we have already mentioned,[1] held, that, in the absence of any specific appropriation by either debtor or creditor at the time of payment, the several sums paid by the surviving partners in the course of the account were to go in discharge of the balance due at the death of Devaynes.

Rule in Sleech's case—Clayton's case.

SEC. 617. We will select two of the cases in Devaynes v. Noble, as illustrative of Sir William Grant's judgment; in one of which it was held that the equity of the creditor against the deceased partner's estate was defeated in part; in the other, that it was defeated *in toto* by the subsequent dealings of the creditors with the new firm.

First, in Sleech's case, representing that class of claimants against the estate of Devaynes who were creditors of the house at the death of Devaynes, and who afterward continued to deal with the surviving partners, by drawing out, but not paying in—it was held, that the equity of the creditors againt Devaynes' estate was defeated in proportion to the sums drawn out, but remained in full force as to the residue. It was likewise held, in the same case, that the creditor's claim was not barred by the circumstance of her having received from the surviving partners a part of her debt, and having taken no step for the recovery of the remainder in the interval between Devaynes' death and the bankruptcy, a period of about eight months.

Secondly, in Clayton's case, upon the same principle, the equity was defeated *in toto*. Clayton represented that class of claimants

[1] See *ante*, p. 935, n. 1. The partnership creditor may continue to deal with the survivor, and receive interest from him without a prejudice to his claim against the assets of the deceased partner. Hamersly v. Lambert, 2 Johns. Ch. (N. Y.) 508.

who, after the death of Devaynes, continued to deal with the surviving partners, both by drawing out and paying in money, payments being made by the surviving partners before they received any money of the creditors; and the balance, varying from time to time, sometimes increased and sometimes diminished, but, upon the whole, considerably increased by the subsequent transactions. At the death of Devaynes, Clayton's cash balance in the hands of the partnership amounted to 1,713*l.*, and a fraction. After the death of Devaynes, and before Clayton paid in any further sums to his account with the bankers, he drew out of the house sums to the amount of 1,260*l.*, thereby reducing his cash balance to 453*l.* and a fraction. From this time to the bankruptcy, Clayton both paid in and drew out considerable sums; but his payments were so much larger than his receipts that, at the time of the bankruptcy, his cash balance in the hands of the surviving partners exceeded 1,713*l.*, the amount of the cash balance at Devaynes' death. By the amount of the dividends received since the bankruptcy (those dividends being apportioned to the whole debt proved under the commission), the balance of 1,713*l.* would be reduced to 1,171*l.* and a fraction; and it was this last sum which Clayton claimed against Devaynes' estate. But, in consequence of the decision in Miss Sleech's case, that claim was abandoned to the whole extent of the cash balance at Devaynes' death above 453*l.*, the sum to which it had been reduced by drafts upon the house previous to any fresh payments made to it, and that which was now claimed was the last-mentioned sum of 453*l.*, minus its proportion of the dividends. It was contended on the part of Clayton that he was entitled to go against Devaynes' estate for a proportion of this 453*l.*, on the grounds that he, as payer of such sum, had a right to appropriate it, *at any time he pleased*, to the account of the old partnership, and consequently, that although since his balance was reduced to 453*l.*, he had drawn out several sums exceeding that amount, yet those sums were not to be set against the 453*l.*, but against the sums which he had subsequently paid in. But Sir William Grant was of opinion that those sums should go in discharge of the 453*l.*, holding, therefore, that Clayton had no claim against Devaynes' estate.

It will be perceived that in this important case of Devaynes v. Noble, all the transactions after the death of Devaynes were with the survivors of the firm only, and not with the survivors conjointly with any new partner in the room of Devaynes. But the latter state of circumstances would, according to some opinions, have made no dif-

ference, and the new partner, in the absence of express evidence to the contrary, would have been taken to have adopted the current account.[1]

Liability in case of continuance of firm under the will of deceased.

SEC. 618. It remains to consider what degree of liability attaches on a deceased partner's estate, in case under some authority given him for that purpose, he directs by his will that his executors shall continue the trade in copartnership with the surviving partners.

It is clear, on general principles, that if the testator limits the extent of his assets to be employed in the partnership trade, such limit can in no way affect the creditors of the partnership at the time of his death. It should seem, however, that any unnecessary delay on the part of such creditors to assert their rights, would materially affect them. For, as Lord Eldon observed, they have the power and the means of calling forth, after the testator's death, the whole of his property in discharge of their demands, and if they do not put an end to that relation (*i. e.*, between the executor and surviving partner), but permit the representative to act, they have, perhaps, no more reason to complain of a decision more limited than that of Lord Kenyon,[2] than they would have if by their own conduct they permitted part of the assets to go to the hands of persons from whom they could not draw them.[3]

Creditors of new firm not entitled to pursue the estate.

SEC. 619. But with regard to the creditors of the new partnership formed by the survivors and executors of the deceased partner, they have no claim upon the general assets of the testator, but only upon such assets as are directed by the will to be employed in the partnership trade.[4] The reason is, that in addition to the security of the assets directed to be employed in the trade, such creditors have likewise the individual security of the executor, who is liable in respect of their debts, not only to the extent of all his own property, but also in his person, and may be also proceeded against as a bankrupt, though he is but a trustee.[5] These creditors, therefore, without resorting to the general assets of the testator, possess the full security which exists in ordinary transactions of debtor and creditor. Moreover, if, as

[1] Pemberton v. Oakes, 4 Russ. 154.
[2] Hankey v. Hammock, Buck, 211, in which the general assets of the testator were made liable.
[3] 10 Ves. 120.
[4] See Cutbush v. Cutbush, 1 Beav. 184; Williamson v. Naylor, 3 Lou. & Coll. 208.
[5] 10 Ves. 120; Wightman v. Townroe, 1 Man. & Sel. 412.

but the executors of the deceased represent him for all purposes of account, and, unless restrained by special agreement, they have the power, by instituting a suit in chancery, to have the affairs of the partnership wound up in a manner which is generally ruinous to the other partners.

The doctrine of non-survivorship has no application to the legal estate in land, or to the right to sue at law for a debt due to the partnership, or to the liability to be sued at law for a debt due by it. Moreover, if two persons agree to become partners, and one of them obtains a lease of land or any other property for the purposes of the partnership, but the other person declines to carry out the agreement and to become a partner, and dies, his executors have no right against the survivor in respect of the property in question.[1]

On the death of a partner the surviving members of the firm become at law solely entitled to sue, and solely liable to be sued in respect of debts owing to or by the firm, and they are consequently the proper persons to get in and pay such debts.[2] But the debts they get in

[1] Reilly v. Walsh, 11 Ir. Eq. Rep. 22.
[2] Sleech's Case, 1 Mer. 564.

Entitled to possession of the assets of the firm.—The surviving partner has the legal right to the partnership effects; but in equity, he is treated as standing merely in the relation of a trustee to pay the partnership debts, and dispose of the effects for the benefit of himself and the representatives of the deceased partner. He is not permitted to deal with the partnership property for his own benefit, but must account strictly for all profits arising therefrom. Case v. Abeel, 4 Paige's Ch. (N.Y.) 393; Ames v. Downing, 1 Bradf. (N. Y. Surrogate) 321; Hanna v Wray, 77 Penn. St. 27; Renfreer v. Pearce, 68 Ill. 125; Mariatt v. Scantland, 19 Ark. 443; Gray v. Palmer, 9 Cal. 616; Andrews v. Brown, 21 Ala. 437; Tillotson v. Tillotson, 34 Conn. 335; Florida v. Redding, 1 Fla. 242; Allen v. Hill, 16 Cal. 113; Holland v. Fuller, 13 Ind. 135. So long as he conducts himself properly in the administration of this trust, a court of equity will not interfere with his management of the estate, or take it out of his hands and place it in the hands of a receiver; but if he misconducts himself in that respect the court will interfere for the protection of the estate of the deceased partner as well as for the protection of the interests of the firm creditors. Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385; Evans v. Evans, 9 Paige's Ch. (N.Y.) 178; Gant v. Reid, 24 Tex. 46. Thus, where on the dissolution of a firm the books were left with one partner to settle up the business of the firm. This partner died, and the surviving partner sued the administrator to recover the books of the firm, and it was held that he was entitled to recover the possession of them, as his rights were the same as though the partnership was on foot at the time of such partner's death, as, even after dissolution the partnership is treated as on foot for the settlement of past firm transactions. Murray v. Mumford, 6 Cow. (N.Y.) 441. So if copartnership assets come to the possession of the administrator of a deceased partner, and are actually administered by him, the surviving partner may obtain relief in equity against the estate of his deceased copartner, without authenticating his claim under the statute of administration. Mariatt v. Scantland, 19 Ark. 443; Gray v. Palmer, 9 Cal. 616. His power of control over the firm property extends to the real estate of the firm until all the firm debts are paid and the affairs of the firm are finally settled, and no rights therein can be acquired by any person, through such deceased partner or any of his representatives, that can in any measure interfere with the rights of the survivor, Cobble v. Tomlinson, 50 Ind. 550, and he may sue as surviving partner for any trespass to the real

must be placed to the credit of the late firm, and the debts they pay must be placed to its debit. Whilst, therefore, the executors of the deceased partner are entitled to have payments made to the survivors

estate of the firm. Pfeifer v. Steiner, 27 Mich. 537. But when, after the dissolution of a partnership, the goods of the firm are intrusted to one of the partners to be by him converted into money by sale at retail, and with the proceeds pay the partnership debts, such partner becomes a trustee, and the exchanging of the goods for land and taking the title in his wife's name are a fraudulent perversion of the trust property, and equity will follow the land thus acquired, and subject it to the debts of the firm as against any person acquiring the title with notice of the facts, or in fraud of the rights of the other partner. Being a trustee, he is bound to exercise the highest degree of good faith, and will not be permitted to take the property at an estimated value even, without the consent of the representatives of the deceased partners, Ogden v. Astor, 4 Sandf. Ch. (N. Y.) 311, nor even with such consent, if he is one of the executors or administrators of such deceased partner's estate, Nelson v. Hayner, 66 Ill. 487; and it would seem that such sale under the circumstances last named is liable to be impeached for fraud, even though the price paid is adequate. Thus, in Case v. Abeel, 1 Paige's Ch. (N. Y.) 393, a surviving partner, being also one of the executors of his deceased partner, agreed with his co-executor that he, the surviving partner, should take the stock at a valuation. It was held that if he had not been executor the agreement would have been valid; but that being an executor he could make no such agreement without being liable to account for profits.

Power to dispose of the firm property.—He has power to sell the firm property, and assign its choses in action, as notes, a bond and mortgage, etc., Pinckney v. Wallace, 1 Abb. Pr. (N. Y.) 82, and at common law, may, with the assent of the representatives of the deceased partner, assign the firm property, in trust for the creditors of the firm. Hutchinson v. Smith, 7 Paige's Ch. (N. Y.) 26; Egberts v. Wood, 3 id. 517. The surviving partner has authority to close up any contract or obligation entered into *before* the decease of his copartner, but cannot bind the estate by any new undertaking. Thus where goods were consigned to a firm of commission merchants to be sold on account of the shippers, but before their sale one of the partners died, it was held that the survivor might sell the same, and that the claim of the shipper was against the firm. Offat v. Scott, 47 Ala. 104. He cannot enter into any new undertakings however, in the name or on behalf of the firm, without the assent of the representatives of the deceased partner. Schenkl v. Dana, 118 Mass. 236. He has an equitable lien upon the firm property, not only for the payment of the debts of the firm to third persons, but also for the payment of any balance due to him from the firm. Grey v. Palmer, 9 Cal. 616; Wade v. Rusher, 4 Bosw. (N. Y. S. C.) 587.

Has the sole right to sue on partnership claims.—He, and he alone, can sue for the recovery of a firm debt. Clark v. Howe, 23 Me. 561, and it has been held that they need not describe themselves as surviving partners, Atwood v. Rattenbury, 6 Moore, 579, but, whether it is essential to allege the character in which he sues or not, the rules of good pleading suggest the propriety of so doing, and a failure to do so is, at least, indicative of a careless and slovenly pleader, and it is believed that, in most of the States, at least, it is necessary that it should be stated, or at least appear from some statement in the complaint or declaration, in what capacity he sues, Josslyn v. Taylor, 24 N. H. 268; Hubbell v. Skiles, 16 Ind. 138; Keith v. Pratt, 5 Ark. 661, but, after verdict, the defect is cured. Hill v. McNeil, 6 Port. (Ala.) 29. The survivor may in his own name foreclose a mortgage due the firm, Robinson v. Thompson, 9 Miss. 454, or maintain an action of trespass for an injury to its real estate, Pfeifer v. Steiner, 27 Mich. 537, and it seems that he *must* sue alone, and cannot join the representatives of the deceased partner, as plaintiffs in the action. Pfeifer v. Steiner, *ante;* Pitton v. Fisher, 44 Ill. 33. The right of action survives, Osgood v. Spencer 2 H. & G. (Md.) 133; Burgwin v. Hastler, 3 N. C. 75, to him alone, upon all partnership claims, of every kind, Davis v. Church, 1 W. & S. (Penn.) 240; Walker v. Galbraith, 3 Head (Tenn.), 315; Bernard v. Wilcox, 2 Johns. Cas. (N. Y.) 374, and he may join a claim due to him from the

by a debtor to the old firm, applied in payment of his debt,[1] the survivors have a right, if they pay more than their share of the debts of the old firm, to be reimbursed out of the estate of their deceased copartner.[2] They are creditors against that estate for what may

defendant individually, with a claim due the firm. Adams v. Hackett, 27 N. H. 293. The representatives of the firm have no right to collect a debt due the firm, and his receipt is no protection to the debtor, Wallace v. Fitzimmons, 1 Dall. (Penn.) 268, and the representative of the deceased partner cannot be joined with him as a party plaintiff in an action, nor can they be joined as defendants, Tracy v. Suydam 30 Barb. (N. Y.) 115; Voorhis v. Baxter, 1 Abb. Pr. (N. Y.) 43; Hedden v. Hedden, 1 Penn. St. 62, except where provision is made therefor by statute, as is the case in some of the States. McCullock v. Judd, 20 Ala. 703; Saunders v. Wilber, 2 Head (Tenn.), 578; Lockhart v. Harrell, 6 La. An. 531.

May sell, transfer or pledge firm property to pay firm debts.—The surviving partner, for the purpose of paying the indebtedness of the firm, may sell, assign, transfer or pledge the assets of the firm, Loeschigk v. Hatfield, 5 Robt. (N. Y. S. C.) 29; Peyton v. Statton, 7 Gratt. (Va.) 381, and he may prefer creditors unless the preference is fraudulent and collusive. Loeschigk v. Addison, 4 Abb. Pr. (N. Y., N. S.) 213; Bredlaw v. Savings Bank, 28 Mo. 186; Roys v. Vilas, 18 Wis. 173. "The death of a partner," say the court in Loeschigk v. Hatfield, *ante*, "invests the survivor with the exclusive right of possession and management of the whole partnership business and property, for the purpose of settling and closing it. Having the right to collect and dispose of the property, he has the power, for that purpose, of assigning, transferring or pledging, any chose in action, or other property belonging to the estate, in payment of a debt. He may make a preferential transfer to a particular creditor; and the title so acquired by such favored creditor cannot be set aside by the other creditors of the firm, without proof of fraud," and the same doctrine has been held in numerous cases, and seems consistent with principle. French v. Lovejoy, 12 N. H. 461; Bredow v. Savings Institution, *ante;* Roys v. Vilas, 18 Wis. 173. But, while he may sell the property to pay firm debts, or assign choses in action, etc., for that purpose, he cannot make a general assignment of the firm property, for the payment of firm debts even, without the assent of the representatives of the deceased partner. Hutchinson v. Smith, 7 Paige's Ch. (N. Y.) 35; Egberts v. Wood, 3 id. 521; Bancroft v. Snodgrass, 1 Coldw. (Tenn.) 441. The surviving partner is bound to account to the estate of the deceased partner, for the estate as it was at the time of such partner's decease. This accounting is due to the estate as an absolute right, and without any reference to the question whether there is any thing due to the estate or not, the right arising from the interest of the estate in the firm property, and its liability to contribute to the payment of the firm debts, Cheeseman v. Wiggins, 1 T. & C. (N.Y.) 595, and so long as the executor or administrator is a party to a bill for an accounting, the fact that he alleges therein that he is also the sole heir of the estate, will not abate the bill, if he is not so in fact, for want of proper parties, because a decree in his favor as administrator does not interfere with the rights of other persons entitled to a distributive share of the estate. Moore v. Huntington, 17 Wall. (U. S.) 417. He is not entitled to commissions for closing up the firm business, Ames v. Downing, *ante*, but he is entitled to have a reasonable sum allowed him for his services, especially where he has continued the business for the protection of the interests of all concerned, with the assent of the representatives of the deceased partner. Thus, where a surviving partner in a firm, engaged in the manufacture of weapons of war, continued the business with the assent of the administrator of the deceased partner, in finishing up a contract with the government, and entering upon new ones, employing the patents and machinery of the firm, it was held that he was entitled to a reasonable compensation for his services, Schenckl v. Dana, 118 Mass. 236, and this rule is not only just, but is generally approved by the courts.

[1] Lees v. Laforest, 14 Beav. 250.

[2] Musson v. May, 3 V. & B. 194.

be due to them, from their deceased partner, on taking the partnership accounts, and they may as creditors institute a suit for the administration of his estate.[1] If he has no legal personal representative, the court having control of the settlement of the estate of a deceased partner will grant a limited administration to a nominee of the surviving partners so as to enable them to institute proceedings to have the partnership accounts properly taken.[2] In the absence of an express agreement to that effect, the surviving partners have no right to take the share of the deceased partner at a valuation, or to have it ascertained in any other manner than by a conversion of the partnership assets into money by a sale.[3] Even the good-will of the business must be sold for the benefit of the estate of the deceased, although the surviving partners are under no obligation to retire from business themselves, and cannot, it seems, be prevented from recommencing business together in the name of the old firm.[4] In ascertaining the share of the deceased, the surviving partners must not only bring into account the assets of the firm which actually existed at the time of his death, but also, whatever has been obtained by the employment of those assets up to the time of the closing of the account, for so long as profits are made by the employment of the capital of the deceased partner, so long must such profits be accounted for by the surviving partners.[5]

On the other hand the surviving partners are entitled, if they carry on the business for the benefit of the estate of the deceased partner, to an allowance for so doing,[6] unless they are also his executors, in which case they can make no charge for their trouble.[7]

Relative rights of executors and surviving partners.

SEC. 624. The right of the executors as against the surviving partners is, simply, to have the share of the deceased ascertained and paid, but this cannot be done without a general sale and winding up of the partnership, unless some other method has been agreed upon. This right, moreover, the executors must enforce for their own safety, unless the persons interested in the estate of the deceased assent to

[1] See Robinson v. Alexander, 2 Cl. & Fin. 717; Addis v. Knight, 2 Mer. 119. If the deceased has pledged his real estate to his copartners for a debt due from him to them, they cannot enforce their security in the absence of his legal personal representative. Scholefield v. Heafield, 7 Sim. 667.

[2] Cawthorn v. Chalie, 2 Sim. & Stu. 127.

[3] Crawshay v. Collins, 15 Ves. 226, 229; Featherstonhaugh v. Fenwick, 17 id. 308.

[4] Webster v. Webster, 3 Swanst. 490.

[5] See Crawshay v. Collins, 2 Russ. 325; Wedderburn v. Wedderburn, 22 Beav. 84.

[6] Brown v. De Tastet, Jac. 284.

[7] Burden v. Burden, 1 V. & B. 170; Stocken v. Dawson, 6 Beav. 371.

the adoption of some other course. And even if they do, it must not be forgotten that the executors cannot, without risk to themselves, continue the share of the deceased in the business, and take the profits accruing in respect of it; for by sharing profits made after the death of the deceased, the executors, although they are only trustees for others, will become *quasi*-partners with the surviving partners, and will become, therefore, liable to be made bankrupt and to be compelled personally to pay debts contracted in carrying on the business.[1] The position of the executors of a deceased partner is, in fact, often one of considerable hardship and difficulty; if they insist on an immediate winding up of the firm, they may ruin those whom the deceased may have been most anxious to benefit; whilst if for their advantage the partnership is allowed to go on, the executors run the risk of being ruined themselves. With a view to obviate this, it is not unusual for one partner to make his copartner his executor; but the difficulty of the executor's position is thus rather increased than diminished, for his own personal interest as a surviving partner is brought into direct conflict with his duty as an executor. Every thing, therefore, which he does is liable to question and misconstruction on the part of the persons beneficially entitled to the estate of the deceased, and he is practically much more fettered in the discharge of his duties, and in the exercise of his rights, than if he had not to act in the double character imposed upon him.[2] This will appear in the section in which it is proposed to examine the rights of the separate creditors and legatees of the deceased against his executors and his surviving partners.

Consequences as regards joint creditors with reference to what occurred before death.

SEC. 625. The position of the executors of a deceased partner, with reference to the creditors of the firm, has, to a considerable extent, been already ascertained. For it has been seen :

That when a partner dies, the creditors of the firm have no remedy at law by which they can obtain payment out of his estate ; their remedy at law being against the surviving partners, and them only, unless the deceased was under a several as well as a joint liability.[3]

That even if his liability was several as well as joint, still, if it arose *ex delicto*, his estate is discharged at law; for as regards torts, *actio personalis moritur cum persona.*

[1] Ex parte Holdsworth, 1 M. D. & D. 475; Wightman v. Watson, 1 M. & S. 412; Ex parte Garland, 10 Ves. 119.

[2] See some general remarks on this subject in Hutton v. Rossiter, 7 De G. Mac. & G. 12.

[3] Martin v. Crumpe, 1 Lord Raymond, 340, and 2 Salk. 444.

That, notwithstanding the death of a partner, and the effect of such death at law, his estate is liable in equity to the creditors of the firm; and not only in respect of debts contracted in his life-time, in the ordinary way of business, but also in respect of debts arising from breaches of trust committed in his life-time by himself, or his copartners, and imputable to the firm.

That this liability cannot be got rid of by any arrangement between the executors of the deceased and the surviving partners; and that, notwithstanding subsequent dealings between the creditors and the surviving partners, the liability of the executors continues, until it can be shown that the creditors have abandoned their right to obtain payment from the estate of the deceased, or that their demands have, in fact, been paid or discharged.[1]

Creditor may pursue estate in equity.

SEC. 626. A creditor of the firm can proceed in equity against the estate of a deceased partner, without first having recourse to the surviving partners, and without reference to the estate of the accounts between them and the deceased. But it is necessary to make the sur-

[1] Cases in which, by death alone, a partner's liability has been extinguished both at law and in equity: Summer v. Powell, 2 Mer. 30, and Turn. & R. 423; Clarke v. Bickers, 14 Sim. 639; Wilmer v. Currie, 2 De G. & Sm. 347. Cases in which, notwithstanding death, a partner's liability has been held not extinguished in equity, although at an end in law: see the celebrated judgment in Devaynes v. Noble, 1 Mer. 539, and 2 R. & M. 495. See, as to liability in respect of contracts, Lane v. Williams, 2 Vern. 292; Simpson v. Vaughan, 2 Atk. 31; Darwent v. Walton, id. 570; Clavering v. Wesley, 3 P. W. 402; Bishop v. Church, 2 Ves. Sr. 100 and 371; Jacomb v. Harwood, id. 265; Burn v. Burn, 3 Ves. 573; Thomas v. Frazer, 3 Ves. 399; Orr v. Chase, 1 Mer. 729; Harris v. Farwell, 13 Beav. 408; Devaynes v. Noble, 1 Mer. 539, and 2 R. & M. 495; Wilkinson v. Henderson, 2 M. & K. 582; Thorp v. Jackson, 2 Y. & C. Ex. 553; Hills v. McRae, 9 Ha. 297; Brett v. Beckwith, 3 Jur. (N. S.) 31, M. R.; Cheetham v. Crook, McCl. & Y. 307.

Liability in respect of frauds and breaches of trust.—Blair v. Bromley, 2 Ph. 354; Sadler v. Lee, 6 Beav. 324; Vulliamy v. Noble, 3 Mer. 619; Devaynes v. Noble; Clayton's case, 1 Mer. 576; Baring's case, id. 612; Ward's case, id. 624. Cases in which the estate of a deceased partner has been held liable, notwithstanding dealings between the creditors of the firm and the surviving partners: Devaynes v. Noble; Sleech's case, 1 Mer. 539; Clayton's case, id. 579; Palmer's case, id. 623; Braithwaite v. Britain, 1 Keen, 206; Winter v. Innes, 4 M. & Cr. 101; Harris v. Farwell, 15 Beav. 31; Daniel v. Cross, 3 Ves. 277; Jacomb v. Harwood, 2 Ves. Sr. 265. Cases in which the estate of a deceased partner has been held discharged by what has taken place between the creditor and the surviving partners:

By general dealings.—Oakley v. Pasheller, 10 Bli. 548, and 4 Cl. & Fin. 207; Brown v. Gordon, 16 Beav. 302.

By payment.—Devaynes v. Noble, 1 Mer. 539; Clayton's case, id. 572. Cases in which the estate of a deceased partner has been held barred by the Statutes of Limitations, notwithstanding payment of interest by surviving partners, and a trust in the will of the deceased for payment of his debts: Way v. Bassett, 5 Ha. 55; Brown v. Gordon, 16 Beav. 302; Thompson v. Waithman, 3 Drew. 628; but see, as to this case, Jackson v. Woolley, 8 E. & B. 778.

viving partners parties to the suit; for although no relief can be obtained in equity against them (their liability being enforceable at law only), they are interested in the issues raised between the creditor and the executors, and must, therefore, be brought before the court.[1] A leading case on this subject is Wilkinson v. Henderson,[2] the judgment in which is of sufficient importance to be extracted at length. The bill was filed by a creditor of the late firm of Shepherd and Hartley, against Hartley, and the executors of Shepherd, praying for payment out of the estate of the latter. The executors objected that, as Hartley was solvent, the creditor ought to proceed against him at law;[3] and Hartley contended that, as no decree could be made against him, he ought not to have been made a party to the suit. With reference to these objections, Sir John Leach observed: "All the authorities establish that, in the consideration of a court of equity, a partnership debt is several as well as joint. The doubts upon the present question seem to have arisen from the general principle that the joint estate is the first fund for the payment of the joint debts, and that the joint estate, vesting in the surviving partner, the joint creditor, upon equitable considerations, ought to resort to the surviving partner before he seeks satisfaction from the assets of the deceased partner. It is admitted that, if the surviving partner proves to be unable to pay the whole debt, the joint creditor may then obtain full satisfaction from the assets of the deceased partner. The real question, then, is, whether the joint creditor shall be compelled to pursue the surviving partner in the first instance, and shall not be permitted to resort to the assets of the deceased partner until it is established that full satisfaction cannot be obtained from the surviving partner; or, whether the joint creditor may, in the first instance, resort to the assets of the deceased partner, leaving it to the personal representatives of the deceased partner to take proper measures for recovering what, if any thing, shall appear upon the partnership accounts, to be due from the surviving partner to the estate of the deceased partner. Considering that the estate of the surviving partner is, at all events, liable to the full satisfaction of the creditors, and must, first or last, be answerable for the failure of the surviving partner; that no addi-

[1] By being made a party or by being served with notice of the decree, see Hills v. McRae, 9 Ha. 297.

[2] 1 M. & K. 582; see, too, Thorpe v. Jackson, 2 Y. & C. Ex. 553; Devaynes v. Noble, Sleech's case, 1 Mer. 539; Devaynes v. Noble, 2 R. & M. 495; Stevenson v. Chiswell, 3 Ves. 566; and as to the plaintiff availing himself of the equities subsisting between the defendants, see Way v. Bassett, 5 Ha. 55.

[3] Cheetham v. Crook, McLel. & Y. 307, is in accordance with this view.

tional charge is thrown upon the assets of the deceased partner by the resort to them in the first instance; and that great inconvenience and expense might otherwise be occasioned to the joint creditors; and further, that, according to the two decisions in Sleech's case, in the cause of Devaynes v. Noble, the creditor was permitted to charge the separate estate of the deceased partner, which in equity was not primarily liable as between the partners, without first having resort to dividends which might be obtained by proof, under the commission against the surviving partner, I am of opinion that the plaintiff is entitled, in this case, to a decree for the benefit of himself, and all other joint creditors, for the payment of his debt out of the assets of Shepherd, the deceased partner. The remedy against Hartley, the surviving partner, is altogether at law; and I can make no decree against him; but he was properly joined as a defendant to the suit, being interested to contest the demand of the plaintiff, and of all other persons claiming to be joint creditors."

Since the above case, the right of the creditor of a firm to institute a suit for the administration of the estate of a deceased member of the firm, and for payment of his debts, joint as well as separate, has never been disputed.[1] If a suit is already instituted for the administration of the estate of the deceased, a creditor of the firm can go in and prove against the estate without being compelled to take any preliminary steps himself.[2] If he has to institute a suit himself, he may file a bill,[3] or proceed by summons in chambers, if a bill should not be thought advisable.

Position of firm creditors as to individual creditors of deceased partner.

SEC. 627. The right of creditors of the firm to obtain payment of their debts out of the assets of a deceased partner being thus established, their position, as regards the other creditors of the deceased, has next to be determined.

Formerly it was held that the creditors of the firm were entitled to rank against the assets of the deceased, *pari passu* with his separate creditors.[4] But this is no longer the doctrine of the court; and it is now held that the separate estate of the deceased must be applied in

[1] In Rice v. Gordon, 11 Beav. 265, one of the cases of this class, the debt due to the plaintiff arose out of a transaction in which he had engaged as surety.

[2] In Cowell v. Sikes, 2 Russ. 191, there was a petition, but this is now unnecessary.

[3] Hills v. McRae, 9 Ha. 297, is an instance of a claim; but claims are now abolished. See Cons. orders, p. 36.

[4] See Burn v. Burn, 3 Ves. 573, where a bond creditor of the firm obtained a decree as if he had been one of the separate creditors of the deceased.

payment of his separate creditors before any part of it can be touched by the creditors of the firm;[1] unless, indeed, there is no joint estate whatever available for them.[2] But the separate estate thus primarily liable to the separate creditors of the deceased, does not include his share in the partnership assets, for he has no share in those assets, except subject to the payment of the debts of the firm. Whilst, therefore, the separate creditors of the deceased are entitled to be first paid out of his separate estate, the creditors of the firm are entitled to be first paid out of its assets, and consequently to be paid in full before the share of the deceased in those assets becomes available for the payment of his separate creditors.[3]

Rule in Brett v. Beckwith.

SEC. 628. The right of the creditors of the firm to obtain payment out of the assets of a deceased partner is well illustrated by the recent case of Brett v. Beckwith.[4] In that case there had been two partners, Young and Beckwith. Beckwith was dead, and Young was bankrupt. A bill was filed by a creditor of the late firm against the executors of Beckwith and the assignees of Young, praying for a declaration that Beckwith's real and personal estate was liable in equity, after satisfying his separate debts, to the joint debts of the firm; for an account of such debts at Beckwith's death; for an account of the joint assets received by his executors and Young's assignees; for an account of Beckwith's separate debts; that his real and personal estate might be applied, first in payment of his separate debts, and then in payment of the joint debts; and that a receiver might be appointed to get in the outstanding joint assets. The court held that the plaintiff was clearly entitled, as a creditor of Beckwith, to have his estate fully administered; and for that purpose to have an account taken of his separate estate; and to have the accounts between Beckwith's executors and Young's assignees also taken, in order to ascertain of what the joint estate consisted; and a decree was accordingly made for taking such accounts.

Substance of decree in such cases.

SEC. 629. When a creditor of the firm proceeds against the assets of a deceased partner, the form of the decree which is made is in substance as follows:

---

[1] See Gray v. Chiswell, 9 Ves. 118; Addis v. Knight, 2 Mer. 117; Croft v. Pyke, 3 P. W. 182.

[2] See Cowell v. Sikes, 2 Russ. 191.

[3] See Ridgway v. Clare, 19 Beav. 111; Hills v. McRae, 9 Ha. 297.

[4] 3 Jur. (N. S.) 31, in the Rolls.

[5] See Hills v. McRae, 9 Ha. 297; Harris v. Farwell, 13 Beav. 407; Rice v. Gordon, 11 id. 271.

1. It is declared that all persons who are creditors of the deceased are entitled to the benefit of the decree.

2. It is declared that the surplus of the estate of the deceased after satisfying his funeral and testamentary expenses and separate debts, was liable in equity at the time of his death to the joint debts of the firm, but without prejudice to the liability of the surviving partner, as between himself and the estate of the deceased.

3. An account is directed to be taken of the funeral and testamentary expenses and separate debts of the deceased, and of the debts of the firm. If the surviving partner is not a party to the suit, liberty is given him to attend in the prosecution of this last inquiry.

4. An account is directed to be taken of the personal estate of the deceased.

5. It is ordered that his personal estate be applied, in the first instance, in the payment of his separate debts and funeral expenses, in a due course of administration, and then in payment of the debts of the firm.

6. And if the personal estate of the deceased is insufficient for the purposes of the suit, inquiries are ordered to be made for the purpose of ascertaining the real estate to which the deceased was entitled.

The decree will, if necessary, direct inquiries whether the creditors of the firm continued to deal with the surviving partners, and what sums have been paid by them to such creditors, and whether the creditors have, by their dealings with the surviving partners, released the estate of the deceased from the payment of their respective debts.

No directions are usually given for the purpose of keeping distinct the joint and the separate estates; but, if necessary, it is conceived that such directions would be given in order that the principles upon which the decree is framed might be properly carried out.[1]

In a recent case,[2] two partners, A and B, had died. A suit was instituted by a separate creditor of A for the administration of his estate; a suit was also instituted by a separate creditor of B, for the administration of his estate; a third suit was instituted by a joint creditor of A and B, for payment of a debt due from both out of both their estates, and a fourth suit was instituted by the representatives of A against the representatives of B, for taking the accounts of the

[1] See the decree in Devaynes v. Noble, 1 Mer. 530, and in Fisher v. Farrington, Seton on Decrees, 280, ed. 2.

[2] See Rice v. Gordon, 11 Beav. 271; Ridgway v. Clare, 19 id. 111; Woolley v. Gordon, Taml. 11; Paynter v. Houston, 3 Mer. 297.

[3] Ridgway v. Clare, 19 Beav. 111.

partnership. The plaintiff in the third suit was found to be a creditor of both A and B, but he was held by the Master not to be entitled to rank as a separate creditor of A. On an appeal from the decision of the Master, the court thought it desirable that the separate creditors should be ascertained, but reserved the question whether the joint creditor was or was not entitled to rank as one of A's separate creditors. The judgment, however, is instructive, as it states the manner in which the court administers the assets of a deceased partner, and pays each class of creditors. It appears that when there are assets sufficient to pay all the creditors, the estate of the deceased forms one fund, out of which the joint and separate creditors are paid *pari passu*, but that they, and the funds for their payment, are distinguished when the assets are in any way deficient.

Questionable whether both remedies can be pursued at once.

SEC. 630. The creditors of a partnership having, on the death of one of the partners, a right at law to obtain payment from the surviving partners, and a right in equity to obtain payment out of the assets of the deceased partner, the question arises whether the creditors can enforce both these rights, or whether they can only avail themselves of one of them.

In the first place, if the creditors proceed at law against the surviving partners, but do not obtain satisfaction, they can afterward proceed in equity against the estate of the deceased partner.[1] So, if the surviving partners become bankrupt, and the creditors of the firm prove against their estate and receive a dividend, they may nevertheless afterward proceed against the estate of the deceased.[2]

In the next place, as the creditors of the firm cannot in equity obtain any decree for payment by the surviving partners, but only a decree for payment out of the assets of the deceased partner, there does not, at first sight, appear to be any reason why, even after a decree for the administation of the estate of the deceased, the creditors in question should not also proceed at law against the surviving partners. As, however, a court of equity in allowing the creditors of the firm to obtain payment out of the assets of a deceased partner is guided by purely equitable considerations, and regards the interests of the surviving partners,[3] and moreover professes to act in analogy to

[1] Jacomb v. Harwood, 2 Ves. Sr. 265.
[2] Heath v. Percival, 1 P. W. 682; Devaynes v. Noble (Sleech's case), 1 Mer. 539.
[3] See Ex parte Kendall, 17 Ves. 525 and 526.

what takes place in bankruptcy, it is conceived, that if it could be shown that injustice would be produced by allowing the creditor to pursue both his remedies at once, the court would compel him to elect between them, or restrain him from proceeding at law.[1]

If more than one partner is dead, a creditor of the firm may, it seems, in one suit obtain a decree against the estates of all of the deceased partners.

In a case before the late Vice-Chancellor Shadwell, there was a partnership of seven persons, A, B, C, etc., and another partnership, A and B, composed of two of the members of the first. A and C were dead. The surviving partners were bankrupt. The plaintiff, who was a creditor of both firms, filed a bill on behalf of himself and all other the creditors of A, and on behalf of himself and all other the creditors of C, against the real and personal representatives of A, the personal representatives of C, and the assignees of the bankrupts. The bill prayed that an account might be taken of what was due from A and C respectively to the plaintiff, and their other joint and separate creditors, and of the personal estates of A and C, and of the real estate of A, and that the personal estates of A and C, and the real estate of A might be applied in payment of their respective debts, as well joint as separate. This bill was demurred to on the ground of multifariousness, but the Vice-Chancellor overruled the demurrer, and held the frame of the suit to be proper in point of form.[2]

With reference to what has occurred since death.

SEC. 631. Having now examined the position of the executors of a deceased partner, with reference to the creditors of the firm, and in respect of debts existing at the time of the death of the deceased, it is proposed to consider the liability of the assets of the deceased, and of his executors, in respect of what may have taken place since his death.

As a general proposition, it is clear that the estate of a deceased partner is not liable to third parties for what may be done after his decease by the surviving partners, and on that ground it has been held that they cannot be restrained from continuing to carry on the business of the late firm in the old name.[3]

In the great case of Devaynes v. Noble,[4] some bills deposited with

[1] If one partner becomes bankrupt, and a creditor of the firm proves against his estate, he cannot afterward sue the bankrupt and his copartners jointly at law. See Bradley v. Millar, 1 Rose, 273. The subject of election in bankruptcy will be examined hereafter.

[2] See Brown v. Douglas, 11 Sim. 283; Brown v. Weatherby, 12 id. 6.

[3] Webster v. Webster, 3 Swanst. 490, note.

[4] Houlton's case, Johne's case, and Brice's case, 1 Mer. 616, etc. See, too, Vulliamy v. Noble, 3 Mer. 614.

a firm of bankers were after the death of one of the partners misapplied by the surviving partners, and an attempt was made to obtain out of the estate of the deceased the value of the bills so misapplied. But the attempt was not successful, Sir William Grant observing: "If there be no remedy at law against the executors of Mr. Devaynes, I am at loss to understand the equity on which this court is to interpose to make good the loss against Mr. Devaynes' estate. It has not been incurred by any thing that he did or neglected to do. The bills were safely kept as long as he had any thing to do with them. From the act of placing them in the custody of a partnership, it followed that upon the death of one of the partners they would fall into the possession of the surviving partners. Mr. Houlton himself, therefore, has virtually placed them there. Mr. Devaynes' executors could not take them away; Mr. Devaynes could not direct his executors to take them away, and though Mr. Devaynes had neither been personally instrumental in the loss nor personally benefited by it, nor could have prevented it, yet it is contended that it is upon his estate the loss ought to be thrown, and that by a court of equity. I apprehend, however, that it would be the reverse of equity to throw the loss on his estate in such a case as the present. It might be as well contended that if they had thrown the bills into the fire, or lost them by negligence, Mr. Devaynes would be responsible for such act or negligence. He had no more to do with the sale of the bills than he would have had to do with a loss occasioned by such means as these."

What acts of an executor impose liability upon assets of deceased partner.

SEC. 632. Moreover, although an executor has power to dispose of the assets of the deceased, and to keep alive demands against them which would otherwise become barred by the Statute of Limitations, still the acts of an executor, to whatever extent they may render him personally liable, do not impose liability on the assets of the deceased, unless those acts have been properly performed by the executor in the execution of the trusts reposed in him. At the same time, there are acts which, if done by an executor, impose liability on the assets of the deceased even in a court of law,[1] and, therefore, if a partner appoints a copartner his executor, and dies, and the executor continues to carry on the business, it is possible that his acts, attributed to him, not as partner, but as executor, may render the assets of the deceased liable for what may have occurred since his death.[2]

[1] See Williams on Executors, vol. ii, p. 1507, etc., 4th ed.

[2] See Vulliamy v. Noble, 3 Mer. 614.

If an executor of a deceased partner employs his assets in carrying on the partnership business, the executor himself becomes personally liable to third parties, as if he were a partner in his own right.[1] And if the deceased partner has himself directed his assets or any part thereof so to be employed, so much of them as are directed to be employed are liable to make good the debts contracted during their employment; to this extent, therefore, his estate will in equity be applicable to the liquidation of the demands of those who have become creditors of the partnership after his decease. In such a case, the creditors are better off than the creditors of ordinary partners, inasmuch as these last have nothing to look to except the property of the partners, whereas, in the case supposed, the creditors have not only the personal security of those who carry on the business, but also something very like a lien on the assets of the deceased employed therein.[2]

Cases illustrating.

SEC. 633. The cases which have occurred upon this subject have for the most part arisen where the executor, having continued the business with the surviving partner, and having become bankrupt with him, has endeavored to withdraw from the joint estate the assets of the deceased employed in the trade. In such cases, the executor has been held entitled to prove for the value of the assets which he embarked in the business without authority (such assets being in substance a loan) but not for the value of those which his testator authorized to be so embarked.

In Ex parte Garland,[3] a miller and farmer made a will whereby he directed his wife to carry on his business, and that for the purpose of enabling her to carry it on, any sum not exceeding 600*l.* should be advanced to her by his trustees. He also directed his wife to give her notes of hand for what might be advanced, and for the value of the stock, crops, and effects in his business. He appointed his wife and the trustees before alluded to, his executors. After his death his widow carried on the business, the stock, crops, and effects in which were valued at 1,351*l.* 5*s.* 0*d.* She also received 600*l.* from the trustees for the purpose of enabling her to carry on the business, and for these two sums she gave them her promissory notes. She also became indebted to the estate of the testator in a further sum of 768*l.* 12*s.* 4*d.*

[1] See Wightman v. Townroe, 1 M. & S. 412; Ex parte Garland, 10 Ves. 119; Ex parte Holdsworth, 1 M. D. & D. 475.

[2] See Ex parte Richardson, Buck, 202, and 3 Mad. 138; Ex parte Garland, 10 Ves. 110; Thompson v. Andrews, 1 M. & K. 116; Cutbush v. Cutbush, 1 Beav. 184.

[3] 10 Ves. 110.

She then became bankrupt, and an attempt was made to prove as debts due from her to the estate of the deceased these three sums of 1,351*l.* 5*s.* 0*d.*, 600*l.*, and 768*l.* 12*s.* 4*d.* But it was held by Lord Eldon that, although the last sum might, the two first could not be proved against her estate, for they represented property which the deceased had authorized to be embarked in trade, and which was, therefore, answerable to the creditors of the trade.

The above decision has been followed by others, and its propriety has never been questioned.[1]

The liability of the estate of a deceased partner to persons who become creditors after his decease is subject to its liability to those who were his creditors at his decease. These last must first be paid, and although, in such a case as Ex parte Garland, they might not be able to follow the assets of the deceased into the hands of the assignees in bankruptcy, yet, in administering the estate of a person whose assets have been employed in trade in pursuance of directions contained in his will, the creditors who have become such since his decease cannot compete with his other creditors.[2]

Effect of provision in will directing continuance of business.

SEC. 634. It has at various times been contended that when a testator directs a trade or business to be carried on after his decease, he thereby subjects all his assets to the payment of debts incurred in the course of carrying it on; and a decision by Lord Kenyon[3] has been supposed to warrant such contention. It is now, however, clearly settled that the extent of the liability of the testator's estate does not exceed the amount authorized by him to be employed in the trade or business directed by him to be carried on,[4] and it is generally admitted that the decision referred to is not inconsistent with this doctrine.[5]

It becomes, therefore, a matter of considerable importance, not only to executors but to creditors, to ascertain what a testator who directs his trade or business to be carried on, has authorized to be employed in carrying it on. This must, of course, depend upon the terms of his will; but it has been held in a recent case that a general direction to carry on a business, in which the testator was engaged at the time

[1] See the cases cited in the last note but one.

[2] See Cutbush v. Cutbush, 1 Beav. 184.

[3] Hankey v. Hammock, Buck, 210, and 3 Mad. 148.

[4] See Ex parte Garland, 10 Ves. 110; Ex parte Richardson, Buck, 202, and 3 Mad. 138; Thompson v. Andrews, 1 M. & K. 116; Cutbush v. Cutbush, 1 Beav. 184; M'Neillie v. Acton, 4 De G. Mac. & G. 744.

[5] See the observations of Turner, L. J., in 4 De G. Mac. & G. 744.

of his death, does not authorize the employment for the purposes of that business, of more of his assets than are embarked therein when he dies.[1] It has also been held that a bequest by a person, of money upon trust to allow it to remain in the concern of which he is a partner, does not necessarily empower the trustees to trade with that money, for the context may show that all the testator meant was that the sum in question should not be called in, but be allowed to remain outstanding as a loan to the surviving partners.[2]

In the case of companies.

SEC. 635. The legal position of the executors of a deceased member of a company is, as regards the creditors of a company, *prima facie* the same as the legal position of the executors of an ordinary partner with respect to the creditors of the firm. Whether the company is incorporated or unincorporated, its creditors have, *prima facie*, no legal *locus standi* against executors, and unless the deceased was under a several as well as a joint liability to the creditors of the company, the latter can only proceed at law against the executors of the former in one of two cases, viz.: First, where the creditors are specially empowered to do so by some statute; or, secondly, where the executors have themselves become shareholders, and so liable as such to the debts of the company. Several cases have been decided at law in which executors, not being themselves shareholders, have been held not liable to creditors of companies;[3] but the writer has not met with a single instance in which a creditor of a company has at law succeeded in establishing a case against executors in their representative capacity.[4]

With respect to the right of a creditor of a company to proceed in equity against the executors of a deceased shareholder, a distinction must be taken between unincorporated and incorporated companies, for whilst the assets of a deceased shareholder in an unincorporated company are *prima facie* liable in equity to the debts of the company

[1] See M'Neillie v. Acton, 4 De G. Mac. & G. 744, where further capital was required.

[2] See Travis v. Milne, 9 Ha. 141.

[3] Ness v. Armstrong, 4 Ex. 21, where the executors had received dividends; Powis v. Butler, 3 C. B. (N. S.) 645, and 4 id. 469, where the deceased's name was kept on the register of shareholders; Poole v. Knott, 7 W. R. 527, where the deceased had died before the creditor had obtained judgment against the company.

[4] The doubt expressed in Ricketts v. Bowlay, 3 C. B. 889, is removed by the decision in Ness v. Armstrong, 4 Ex. 21; and the case of Ness v. Bertram, 4 Ex. 191, turned entirely on a point of pleading. Even if a creditor can proceed against the estate of a deceased shareholder at law, he will be restrained from so doing, if a decree has been made for administering such estate. Re Walton, 23 Beav. 480.

contracted before his decease, the assets of a deceased member of a body corporate are, *prima facie*, not liable in equity, any more than at law, to the payment of the debts thereof. But as regards both classes of companies, the position of executors in fact depends less on general principles than on particular statutes, the provisions of which must, therefore, not be overlooked. Thus, although banking companies governed by 7 Geo. IV, c. 46, are not corporate bodies, and although creditors of such companies are, it seems, entitled to obtain payment of their debts out of the assets of a deceased shareholder, still the creditors' rights are so far modified by the act in question, that, whether they are creditors by specialty or by simple contract, the lapse of three years after the death of a shareholder bars their claim against his executors,[1] and even within that period, the executors are only liable to pay such debts as the surviving shareholders are unable to discharge.[2]

The liabilities of executors as contributories under the Winding-up Acts, will be alluded to hereafter; it may, however, be observed, that their liability to calls under those acts is not confined to calls made for the payment of debts incurred by the company prior to their testator's decease.[3]

Consequences as regards the separate creditors, legatees and next of kin of the deceased.

SEC. 636. In considering the consequences of the death of a partner or shareholder, as regards his separate creditors, and his legatees or next of kin, it will be convenient first of all to examine their rights under ordinary circumstances, and then to advert to the complicated questions which arise when the assets of the deceased, instead of being realized, are allowed by his executors to be employed in the business carried on by the firm or company to which he belonged, and when shares in companies are specifically bequeathed.

General rule as to separate creditors, etc.

SEC. 637. Under ordinary circumstances the separate creditors, legatees, and next of kin of a deceased partner, must look for payment of what is due to them out of his assets to his legal personal representative, and to him alone.[4] The executors are, under ordinary

[1] See Barker v. Buttress, 7 Beav. 134.
[2] Howard v. Wheatley, Ex parte Wilson, 5 De G. & S. 552. Compare Re Walton, 23 Beav. 480.
[3] See Blakeley's case, 13 Beav. 133, and 3 Mac. & G. 726.
[4] Alsager v. Rowley, 6 Ves. 748; Saunders v. Druce, 8 Drew. 140. If there is no person who in this country represents the deceased, a representative will be appointed. See Macclean v. Dawson, 5 Jur. (N. S.) 1091.

circumstances, the only persons who have a right to call upon the surviving partners for an account, and of this right they do not divest themselves by a sale and assignment of the share of the deceased, for the effect of such sale and assignment is only to make the executors trustees for the purchaser.[1]

The leading modern case illustrating the doctrine that the executors of a deceased partner are, under ordinary circumstances, the only persons entitled to require an account from the surviving partners, is Stainton v. The Carron Company.[2] There a bill was filed by the residuary legatees of a person who had been the agent of and a shareholder in a company against his executors and other persons interested in the will of the deceased and against the company. The bill charged that one of the executors was an agent and manager of the business of the company and that he and another executor were large shareholders therein, and that a third executor was also an agent and manager and was entitled under the will of the testator to ten shares in the company, and that all three executors had interests conflicting with their duties as executors and trustees, and the bill prayed (among other things) that the company might transfer the testator's shares to his executors, and that an account might be taken of what was due from the company to his estate, and for payment to the executors of the amount to be found due. The company and one of the executors demurred, and their demurrers were allowed. In delivering judgment, the Master of the Rolls thus summed up the effect of the cases on this subject: "The persons interested in the estate of the testator, not being the legal personal representatives, will not be allowed to sue persons possessed of assets belonging to the testator, unless it is satisfactorily made out that there exist assets which might be recovered, and which but for such suit would probably be lost to the estate." And again: "To support such a bill as this it is not sufficient to prove that it may be an unpleasant duty to the executors and trustees to take the necessary steps for protecting the property intrusted to them. It is not sufficient to show that it will be for their interest not to take such steps; it is necessary to show that they prefer their interest to their duty and that they intend to neglect the performance of the obligation incidental to the office imposed upon them by the testator and which they have undertaken to perform.

"The executors, it may be observed, have, in ordinary cases, a per-

[1] Clegg v. Fishwick, 1 Mac. & G. 294. [2] 18 Beav. 146.

sonal interest in getting in the assets of the deceased, for, if they willfully neglect so to do, they will be made to account for them, although they may not actually have received them.[1]

It must not, however, be supposed that in a suit against the executor of a deceased partner by a separate creditor, legatee, or next of kin, no account of the deceased partner's share in the partnership can be decreed or taken, for it is the common course in such a suit to direct an inquiry what is due to the estate of the deceased in respect of such share.[2] But in a suit of this description the surviving partners can only be treated as witnesses; no decree can be made against them for payment of what is due on the account, and the executors must, if necessary, take proceedings against them to obtain such payment.

It seems that under an ordinary decree for the administration of the estate of a deceased partner the partnership accounts will not be gone into unless the decree specially directs some inquiry to be made with reference to the share of the deceased. But it is difficult to see how any account of his personal estate can be taken without such an inquiry, and it has been decided more than once that if the surviving partners seek to obtain payment of a balance from the estate of the deceased on the partnership accounts, these accounts must be taken, although no special direction as to them may be contained in the decree.[3]

Exceptions to the rule.

SEC. 638. Notwithstanding, however, the general rule that the separate creditors, legatees, or next of kin of a deceased partner have no *locus standi* against his surviving partners, this rule is by no means without its exceptions. Indeed, there are cases to be met with which apparently warrant the inference that surviving partners may always be sued along with the executor or administrator of the deceased.[4] But the authority of these cases has recently been called in question and the better opinion now is that some special circumstances are necessary to justify such a course.[5] The special circumstances which

[1] See, as to charging the executor of a partner with willful default, Ward v. Ward, 2 Ho. Lo. Ca. 777, and Rowley v. Adams, id. 726, and 7 Beav. 395; Kirkman v. Booth, 1 id. 273.

[2] As in M'Donald v. Richardson, 1 Giff. 81.

[3] See Paynter v. Houston, 3 Mer. 296; Baker v. Martin, 5 Sim. 380; Woolley v. Gordon, Taml. 11.

[4] See Newland v. Champion, 1 Ves. Sr. 106, and 2 Coll. 46; Bowsher v. Watkins, 1 R. & M. 277

[5] See Davies v. Davies, 2 Keen, 534; Law v. Law, 2 Coll. 41; Travis v. Milne, 9 Ha. 141; Stainton v. The Carron Co., 18 Beav. 146.

have been held sufficient are, collusion between the executors and the surviving partners,[1] refusal by the former to compel the latter to come to an account,[2] dealings which may have precluded the executors from themselves obtaining any account,[3] the fact that the executors are themselves partners and liable, therefore, to account as partners to themselves as executors.[4] And, generally, where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution by the executors, of the rights of the persons interested in the estate of the deceased, against the surviving partners, there it has been said a suit may be instituted by those persons against the executors and the surviving partners.[5]

If the surviving partners and the executors are different persons, and they have come to an account respecting the partnership affairs, and have settled such account as a final account, the account thus settled is binding, as between the surviving partners and the persons interested in the estate of the deceased partner, and cannot be impeached, save on the ground of fraud.[6] But if the executors are themselves the surviving partners, or some of them, it becomes exceedingly difficult to make any arrangement which will be binding on the persons interested in the estate of the deceased; for even if any arrangement is assented to by such persons, it will be liable to be successfully disputed on any of those numerous grounds which are held to invalidate arrangements between trustees and their *cestuis que trustent*, and by which the former do, or may, obtain any benefit at the expense of the latter. A remarkable instance of this is afforded by the case of Wedderburn v. Wedderburn,[7] where an account of a deceased partner's estate was directed, at the suit of the persons beneficially interested therein, although thirty years had elapsed since his death, and several changes had taken place in the firm, and releases had been given to the executors by their *cestuis que trustent*.

When the share of the deceased is not got in.

SEC. 639. Executors, unless authorized by their testator, have no business to leave his assets outstanding in the trade or business in

[1] Doran v. Simpson, 4 Ves. 651; Gedge v. Traill, 1 R. & M. 281, note *c*. C. L. R. 21; Alsager v. Rowlay, 6 Ves. 748.

[2] Burroughs v. Elton, 11 Ves. 29; the prayer of the bill in this case may be usefully referred to.

[3] Law v. Law, 2 Coll. 41, and on appeal, 11 Jur. 463; Braithwaite v. Britain, 2 Keen, 206.

[4] Cropper v. Knapman, 2 Y. & C. Ex. 338; Travis v. Milne, 9 Ha. 141, as to continuing the deceased's assets in the business.

[5] Travis v. Milne, 9 Ha. 150.

[6] Davies v. Davies, 2 Keen, 534; Smith v. Everett, 5 Jur. (N. S.) 1332.

[7] 2 Keen, 722, and 4 M. & Cr. 2.

which he was engaged when he died. In a recent case it was laid down by the court to be a rule without exception that to authorize executors to carry on a trade, or to permit it to be carried on with the property of a testator held by them in trust, there ought to be the most distinct and positive authority and direction given by the testator for that purpose.[1] A bequest of his share and interest in the partnership to one person for life, and then to another, does not, without more, warrant the trustees of his will in keeping such share and interest unconverted into money; and it is, therefore, their duty to realize it, and invest what they receive for the benefit of the legatees.[2]

Where an executor improperly employs the assets of the testator in a business carried on by himself, he is chargeable, at the option of the persons beneficially interested in the estate of the deceased, either with the sum employed and interest thereon at 5*l.* per cent, or with the sum employed and the profits made by its employment.[3] And such persons are not deprived of this option by the circumstance that it will be difficult and expensive to ascertain what part of the profits has arisen from the employment of the assets of the deceased, for whatever difficulty may exist is attributable to the conduct of the executor himself, and cannot, therefore, be effectually urged by him as a reason why no account of profits should be taken.[4]

It follows from the doctrine above stated that if one of two partners makes the other his executor, and dies, the surviving partner must not only account to the estate of the deceased for what may be due, in respect of the testator's share in the partnership,[5] but also for the profits made since his death, by the employment of his capital in the business carried on by the late firm, and it is immaterial whether such business has been continued by the surviving partner alone, or by him and others in partnership with him.[6] The obligation of the executor thus to account is founded on a breach of trust committed by him, for which he is liable at all events, whether other persons are also liable or not, and being founded on a breach of trust, a suit in respect of it may be sustained against the executor alone, although he may be only one of several, by whom the profits have been made.[7]

[1] Kirkman v. Booth, 11 Beav. 273.
[2] Kirkman v. Booth, 11 Beav. 273; see Skirving v. Williams, 24 id. 275.
[3] See Docker v. Somes, 2 M. & K. 655; Palmer v. Mitchell, id. 672, note; Townend v. Townend, 1 Giff. 201.
[4] Docker v. Somers, 2 M. & K. 655; Townend v. Townend, 1 Giff. 201.
[5] Phillips v. Phillips, Finch, 410.
[6] M'Donald v. Richardson, 1 Giff. 81.
[7] M'Donald v. Richardson, 1 Giff. 81, and compare Simpson v. Chapman, 4 De G. Mac. & G. 154.

Upon the principle that every one concerned in a breach of trust with notice of the trust is answerable for such breach, it follows that if a partner dies, and his surviving partners allow his assets to remain in their business, with the knowledge that to suffer them so to remain is a breach of trust on the part of the executors, the surviving partners will be themselves responsible to the separate creditors, legatees, or next of kin of the deceased, for any loss which may be thereby sustained.[1] And, further, inasmuch as it is, *prima facie*, a breach of trust for executors to allow the assets of the deceased to remain in the business carried on by him at his death, surviving partners, who knowingly carry on the business with the assets of the deceased, will be answerable as before, unless they can show that no breach of trust was in fact committed.[2]

But if the executors are authorised to lend part of the assets of the deceased to his surviving partners, the latter will not be accountable for the profits they may make by the employment in their trade of money lent to them by the former in pursuance of their authority,[3] nor, if the money is lost, will the executors be responsible, if they took such security for its repayment, as, having regard to the will of the testator, it was their duty to take.[4]

The right of a legatee to an account of profits, and the difficulty of the position of executors who were the partners of the deceased, and who continue his assets in the business, are well illustrated by the recent case of Townend v. Townend.[5] There three brothers, A, B, C, were in partnership, under articles by which it was provided that the capital of the partners should not be withdrawn until the expiration of seven years from that date; that, in case of the death of one of the partners within that term, a valuation of his share should be made, and that the surviving partners should pay to his representatives the amount of such valuation within three years from the said term of seven years, and in the meantime give sufficient security for the same by a mortgage of a competent part of the partnership property. It was also provided that it should not be lawful for the representatives to commence any action for recovering payment of the share of the deceased until the end of three years after the expiration of the term of ten years, nor to claim any participation in the profits

[1] See Wilson v. Moore, 1 M. & K. 127 and 337; Booth v. Booth, 1 Beav. 125, and compare Ex parte Barnewall, 6 De G. Mac. & G. 801.

[2] Travis v. Milne, 9 Ha. 141.

[3] Parker v. Bloxham, 20 Beav. 294.

[4] Paddon v. Richardson, 7 De G. Mac. & G. 563.

[5] 1 Giff. 201.

made after the day up to which the valuation was made, the expressed intention being that the representatives of the partner dying should take 5*l.* per cent on the value of the share in lieu of profits. It was further provided that nothing should prejudice the right of the representatives, within the term of seven years, to take any proceedings in order to obtain a fair valuation, or to obtain and enforce the mortgage security. In April, 1844, A died, having by will devised his real and personal estate to B, C and D, upon trust, to raise the sum of 12,000*l.* and invest the same in government or real security, and apply the proceeds toward the maintenance and education of the plaintiff, his then infant daughter, and accumulate the surplus at compound interest; and upon his daughter attaining twenty-one, to pay the accumulations to her, and to stand possessed of the capital on trust, to pay her the proceeds during her life. The testator's estate consisted almost entirely of his share in the partnership. In December, 1844, a valuation was made, by which the testator's share was ascertained to be 20,000*l.* and upwards. In June, 1853, being more than ten years from the date of the articles, certain hereditaments, consisting of freeholds, leaseholds, and machinery (part of the partnership assets), were mortgaged by B to C and D, as a security for the 12,000*l.*[1] The plaintiff came of age in 1857, and in 1858 B and C rendered to her an account of the trust funds, in which they debited her with various items for maintenance and education, with 5*l.* per cent interest thereon, and credited her with the sum of 12,000*l.* and interest at 5*l.* per cent with yearly rests, up to the 1st May, 1853, and thenceforth with interest at 4*l.* per cent with yearly rests. The plaintiff, however, insisted that the 12,000*l.* had been continued in the partnership business, and she filed a bill against B, C and D for an account of the profits made in the partnership business on the sum of 12,000*l.* from the testator's death, and for payment of what should be found due to the plaintiff, alleging that the mortgage was an improper security. The court held, 1, That the plaintiff was entitled to an account of the legacy of 12,000*l.*, with interest at 5*l.* per cent, from one year after the testator's death up to the 1st January, 1849 (ten years from the date of the articles), and with compound interest on the surplus, after allowing for sums expended for her maintenance and education; 2, that the plaintiff was entitled to an account of the profits made by the partners from the 1st

[1] The property, so far as it could be regarded as an authorized security, was not an adequate security for 12,000*l.*

January, 1849, on the balance found due for the principal at that date, with interest at 5*l.* per cent and annual rests; 3, that she was entitled to a decree for payment of what should be so found due; and, 4, that the entry of the sum of 12,000*l.* in the account furnished by B and C must be taken as conclusive against them that they had such a sum in their hands. It was considered that the mortgage had not the effect of withdrawing the 12,000*l.* from the business: it was part of a plan for keeping the money in the business; and the 12,000*l.* ought not to have been left on the security of property from which the trustees ought to have recovered it.

It sometimes happens that the executor of a deceased partner is taken into partnership by the surviving partners, and a question then arises whether the profits received by the executor as partner belong to him personally, or to the estate which he represents. This must depend on the character in which the executor became a partner. If admitted as the representative of the deceased, and in respect of the share to which he was entitled, the executor must account for any profits which he may have obtained as partner; but, on the other hand, if he was admitted in some other character and on other grounds, the profits coming to him as partner will not form portion of the assets for which he must account as executor.[1]

[1] See Simpson v. Chapman, 4 De G., Mac. & G. 154.

CHAPTER XXVI.

EXTINCTION OF LIABILITIES.

SEC. 640. Extinction of liability.
SEC. 641. Composition deed treated as release.
SEC. 642. May be limited to one partner.
SEC. 643. Covenant not to sue not treated as release.
SEC. 644. Payment by one, payment by all.

Discharge of the whole by the act of one partner.

SEC. 640. Having seen in what manner the estates of a retiring, and of a deceased partner may be relieved from their respective liabilities, let us shortly consider how the estate of the whole firm may be discharged by the act of one or more partners. This, it is apprehended, can only be done by release or satisfaction; but, in either case, the act of release or satisfaction, as between the creditor and one partner, will inure to the benefit of the firm. Thus, where A & B are bound jointly and severally to C, a release to one is a release of the debt to both.[1] Now a learned writer observes that doubtless a release will have operation upon a debt due from a partnership by simple contract as well as by specialty, and that where a creditor receives only part of his demand from one partner upon a bill of exchange, or for goods sold, he may come upon the others for the residue; but if he seals a release to one, whatever sum may still be due to him, he is barred as against each and all of them.[2]

---

[1] Hammon v. Rall, March, 202; Needham's case, 8 Rep. 136; Bower v. Swadlin, 1 Atk. 294; Co. Litt. 232, a; Collins v. Prosser, 1 B. & C. 682. To a plea of a release by one of two joint obligors the plaintiff cannot reply that the release was given upon the undertaking on the part of the other obligor (defendant) not to be released. Cocks v. Nash, 9 Bing. 341. This is not the rule in those States where by statute it is provided that the release of one joint creditor shall only operate as a release to him. Therefore, in determining the application of this doctrine in a given case, reference must be had to the statute and to the intention of the parties.

[2] Wats. Part. 227. So if a creditor receive payment of part of his debt from a surety, such payment alone will not operate as a discharge to the co-surety, for, if the latter be compelled to pay more than his share, he will still have his right of contribution; but if the

Composition deed treated as release.

SEC. 641. Upon this principle it has been decided that if, upon the dissolution of a partnership, the joint creditors execute a composition deed to that partner who winds up the affairs of the partnership, such deed is in the nature of a release, and will discharge the other partner from his liability for the joint debts.[1]

May be limited to one partner.

SEC. 642. But a release given to one of two partners may, by means of recitals and provisos, be limited in its operation to that one partner only, and may even leave that partner open to actions on account of his copartner. Thus, in Solly v. Forbes,[2] an action was brought against the defendants, Forbes & Ellerman, for money paid, etc. Forbes pleaded the general issue. Ellerman pleaded the general issue, a release, and set-off. The release was expressed to be made between the plaintiffs of the one part, and the defendants, Forbes & Ellerman, of the other, and recited, among other things, that there were various transactions of business between Forbes & Ellerman and the plaintiffs; and that, upon the balance of accounts between the two houses, Forbes & Ellerman stood indebted to the plaintiffs, as copartners in trade, in a considerable sum of money, the whole of which was then due and owing; and that Ellerman had offered to the plaintiffs to pay them the sum of 3,000*l.* upon having such a release from

creditor on receiving such part payment discharge the surety from his whole liability, that is a discharge to the cosurety. Nicholson v. Revill, 4 Ad. & Ell. 675; Mayhew v. Crickett, 2 Swanst. 192. But subsequent consent may revive the liability of the surety without a fresh consideration. Id., and see Smith v. Winter, 4 M. & W. 454.

[1] Ex parte Slater, 6 Ves. 146.

[2] 4 Moore, 448; 2 Brod. & Bing. 38. For a tort, the release of one at common law was a release of all. Co. Litt. 232; Bac. Ab. (G.); Williamson v. McGinnes, 11 B. Monr. (Ky.) 74.

Release. — A release by one partner of the obligation of a debtor to the firm generally releases all the others. Gray v. Brown, 22 Ala. 262; Tuckerman v. Newhall, 17 Mass. 581; American Bk. v. Doolittle, 14 Pick. (Mass.) 126; Wiggin v. Tudor, 23 id. 444; Barson v. Kincaid, 3 Penn. St. 57; Willings v. Consequa, 1 Pet. (U. S. C. C.) 301; Gray v. Brown, 22 Ala. 262; Brown v. Marsh, 7 Vt. 327. But it has been held that the release, to be effectual to discharge all the partners, must be one under seal, and then the discharge is placed on technical grounds relating to specialties. Harrison v. Clare, 2 Johns. (N. Y.) 449; Rowley v. Stoddard, 7 id. 207; DeZeng v. Bailey, 9 Wend. (N. Y.) 207; Catskill Bk. v. Messenger, 9 Cow. (N. Y.) 37; Shaw v. Pratt, 23 Pick. (Mass.) 305; Lunt v. Stephens, 24 Me. 534. And wherever there are circumstances showing an intention not to release the other partners, even though the release is executed to one of them under seal, this has been held not to release the others, as where by its terms it limits the release only to the individual. Wiggin v. Tudor, 23 Pick. (Mass.) 444; Sally v. Forbes, 4 Moore, 448; Wilson v. Mower, 5 Mass. 411; or where there is a mere covenant not to sue the particular partner to whom it is executed. Couch v. Mills, 21 Wend. (N. Y.) 424; Chandler v. Herick, 19 Johns. (N. Y.) 129; Hosack v. Rogers, 8 Paige's Ch. (N. Y.) 229; McLeland v. Cumberland Bk., 24 Me. 566; Goodnow v. Smith, 18 Pick. (Mass.) 416; Shed v. Pierce, 17 id. 623.

the plaintiffs as thereinafter contained; the release then witnessed that for valuable considerations (money and promissory notes to the amount of 3,000*l.*), the plaintiffs remised, released, and forever discharged Ellerman, his executors, administrators, and assigns, from all actions, suits, debts, sum and sums of money, claims, demands, etc., in law and in equity, which the plaintiffs then had or might have against Ellerman, his executors, administrators, or assigns, by reason of any matter, cause or thing whatsoever, relating to the premises from the beginning of the world to the day of the date of those presents, except and subject nevertheless to the provisos, declarations, or agreements thereinafter contained. Provided always, etc., that those presents or any thing therein contained should not release, or be construed to release, or in any manner to prejudice and affect any claims or demands which the plaintiffs, or either of them, ever had or might have upon or against Forbes, either separately or as a partner with Ellerman, or upon or against the joint estate or effects of Forbes & Ellerman, in respect of the debt so due from Forbes & Ellerman to the plaintiffs, or any part of such joint estate or effects, whether the same should be in the hands of, or recoverable from Forbes & Ellerman, or either of them, or any other person or persons whomsoever. Provided also, nevertheless, etc., that it should be lawful for the plaintiffs, from time to time, when and as they should be thereto advised to commence and prosecute any actions, suits, or other proceedings, either at law or in equity against Ellerman jointly with Forbes, or against Ellerman, his executors, administrators and assigns separately, for the purpose of recovering or compelling or of enabling the plaintiffs to recover or compel payment or satisfaction of the debt so due and owing from Forbes & Ellerman to the plaintiffs as aforesaid, either by or out of any the joint estate or effects of Forbes & Ellerman, or by or from Forbes, his executors, administrators, or assigns, or his separate estate and effects.

The plaintiffs by their replication averring that the action was brought to compel payment of the moneys due to them from Forbes & Ellerman, either out of the joint estate of Forbes & Ellerman, or from Forbes or his separate estate, the defendant Ellerman demurred to the replication and in support of the demurrer it was contended, among other things, that the provisos in this release were void as being repugnant to the nature of the instrument. But the Court of Common Pleas, after taking time to consider the case, overruled the demurrer, being of opinion that the release, as set forth, was no bar

to the action. Dallas, C. J., said that no doubt could be entertained that it was meant to release Ellerman as to person and effects, but not Forbes, and, therefore, to retain against Ellerman every right and remedy necessary to enforce payment from Forbes; that it was expressly provided and declared that it should be lawful for the plaintiffs to commence and prosecute any action against Ellerman jointly with Forbes for the recovery of the joint debt; that this was a joint action for the recovery of such debt, and, therefore, an action expressly and in direct terms authorized by the deed of release itself.

Covenant not to sue, not treated as release — Hutton v. Eyre.

SEC. 643. Although a release to one partner is generally a release to all, yet a covenant not to sue one of several partners will not operate as a release to the others, because the use of such an instrument evidences an intention on the part of the covenantor to avoid the legal effects of a release as to copartners. In Hutton v. Eyre,[1] the plaintiff and defendant had been partners. In August, 1809, they entered into a deed to dissolve the partnership as from the 1st January then next, in which deed it was covenanted that neither of them should, after the signing of the deed and before the 1st of January, purchase any goods in the name of the firm of Hutton & Eyre. The notice of dissolution did not appear in the "Gazette" till the 24th of January, 1810. On the 27th October, 1810, the defendant executed an assignment of all his property to trustees for the benefit of his creditors, in consideration of which the creditors covenanted with the defendant not to sue him on account of any debt due to them from him, and that in case they did sue him, the deed of assignment should be a sufficient release and discharge for him. Between the time of executing the deed of dissolution, and the 1st of January, 1810, the defendant contracted different debts in the name of Hutton & Eyre. The assignees having paid only a small dividend, the plaintiff was obliged to pay the deficiency, to recover which he brought his action and obtained a verdict against the defendant. A question was then raised for the defendant as to whether the action was maintainable, it being contended that the deed of composition operated as a release, not only to the defendant, but also to the plaintiff, as the defendant's partner, and, therefore, that the plaintiff was under no obligation to pay the remainder of the debts, and had consequently paid them in his own

[1] 1 Marsh 603. But in Iowa it is held that a creditor may release one partner from all liability, and hold the other liable for his claim. Gardner v. Baker, 25 Ia. 343. But under the statute of that state one of both may be sued. Ryerson v. Hendric, 22 Ia. 480; see, also, Wilson v. Horne, 37 Miss. 477.

wrong. The Court of Common Pleas held that the action was maintainable. Gibbs, C. J.: "In a case like the present it is impossible to contend that, by a covenant not to sue the defendant, it was the intention of the covenantors to release the plaintiff, who was able to pay what his partner might be deficient in. It would have been an easier and a shorter method to have given a release, than to make this covenant. The only reason, therefore, for their adopting this course was that they did not choose to execute a release to the defendant, because that would also have operated as a release to the plaintiff; whereas, they considered that a bare covenant not to sue the defendant would not extend to his partner. As, therefore, the terms of the covenant do not require such a construction, and as such a construction would be manifestly against the intention of the parties, we are decidedly of opinion that it ought not to be suffered so to operate."

Payment by one, payment by all.

SEC. 644. Payment by one of several partners on their joint account is payment by all.[1] And where two houses are partners in a particu-

[1] Innes v. Stephenson, 2 Mood. & Malk. 145. Where two partners are defendants, and both are arrested on a joint *ca. sa.* for the amount of the damages, and one is discharged on giving a promissory note to the plaintiff, payable by installments, this operates as a discharge to the other. Ballam v. Price, 2 Moore, 235; and see Foster v. Jackson, Hob. 59. And if the plaintiff consent to discharge one of several defendants taken on a joint *ca. sa.*, he cannot afterward retake him, or any of the others. Clerk v. Clement, 6 T. R. 525; see Basset v. Salter, 2 Mod. 136; Blackburn v. Stupart, 2 East, 243; Tanner v. Hague, 7 T. R. 420. In Crow v. Commonwealth, 6 Pitts. Leg. Jour. (N. S.) 95—a case decided by the Supreme Court of Pennsylvania in which it was held that in the distribution of the proceeds of the sheriff's sale of partnership effects, the firm creditors should be paid according to the priority of their liens, whether their judgments be against a partner or the whole firm, and the creditor could go behind the record to show that it was a firm debt. This case seems to be contrary to the weight of authority. It has been held, in effect, that a judgment against one partner precludes an action against the others. See Nichols v. Burton, 5 Bush, (Ky.), 320; Candee v. Clark, 2 Mich. 255; Mason v. Eldred, 6 Wall. (U. S.) 231; Sedan v. Williams, 4 McLean (U. S. C. C.), 51; Crosby v. Jeroloman, 37 Ind. 276; Sloo v. Lea, 18 Ohio, 379; Haw v. Kane, 2 Chand. (Wis.) 222; Robertson v. Smith, 18 Johns. (N. Y.) 459; Smith v. Black, 9 S. & R. (Penn.) 142; Sedam v. Hodges, 4 McLean (U. S.), 51; Ward v. Johnston, 13 Mass. 148; Van Valen v. Russell, 13 Barb. (N. Y.) 593; Philson v. Bampfield, 1 Brev. (S. C.) 202; Moale v. Kallins, 11 G. & J. (Md.) 11; Ward v. Motter, 2 Rob. (Va.) 559; Gibbs v. Bryant, 1 Pick. (Mass.) 121; Pierce v. Kearney, 5 Hill (N. Y.), 94; Peters v. Sanford, 1 Den. (N. Y.) 224; Willings v. Consequa, 1 Pet. (U. S. C. C.) 301; Nichols v. Aguera, 2 Mills (S. C.), 290; Moss v. McCullough, 5 Hill (N. Y.), 135. How, then, can a judgment against one partner be afterward regarded as a partnership liability? "A judgment against the known members of a partnership discharges the secret or dormant members." Scott v. Colmesnil, 7 J. J. Marsh. (Ky.) 416; Smith v. Black, 9 S. & R. (Penn.), 142; Moale v. Hollins, 11 G. & J. (Md.) 11. But this rule has not been adhered to in South Carolina. Watson v. Owens, 1 Rich. 111; Union v. Hodges, 11 id. 480; Kentucky: Bronzel v. Poyntz, 3 B. Monr. (Ky.) 178; Tennessee: Nichols v. Cheare, 4 Sneed (Tenn.) 229; Maine: Dennett v. Chick, 2 Me. 191, and in United States Court, Van Ness v. Forrest, 8 Cr. (U. S. C. C.) 30. Regarding a partnership as a mutual agency, electing to sue one partner and prosecuting the suit to judgment would seem to be a discharge of the other partners, although

lar transaction, payment by one house on account of that transaction

the judgment was not satisfied. Priestly v. Ferine, 3 H. & C. 977, and Calder v. Dobbell, L. R., 6 C. P. 486; King v. Hoare, 13 M. & W. 494; Ex parte Higgins, 5 De G. & J. 33. In England the rule is the same as in most of the states of this country, and a discharge of one partner, or a judgment against him, discharges the others. Mr. Lindley in his work on Partnership, p. 368, says: "If two partners are indebted on the partnership account, and one of them gives a bill or note for the debt, and that bill or note is dishonored, the creditor who took it will not be precluded from having recourse to both partners for payment. Bottomley v. Nuttall, 5 C. B. (N. S.) 122; Whitwell v. Perrin, 4 id. 412; Ex parte Hodgkinson, 19 Ves. 291; see, too, Ex parte Raleigh, 3 M. & A. 670, unless it can be shown that he intended to substitute the liability of the one for the joint liability of the two. As the jury found was the case in Evans v. Drummond, 4 Esp. 89, and Reed v. White, 5 id. 122. Compare with the cases preceding. But when a creditor obtains from his debtor a security of a higher nature than he had before, the original debt is merged in the higher security, and can no longer be made the foundation of any action or suit, or of proof in bankruptcy or insolvency; Higgen's case, 6 Co. 44, b; Owen v. Homan, 3 Mc. & G. 378; Price v. Moulton, 10 C. B. 561; Shack v. Anthony, 1 M. & S. 572; but the original debt may be made the foundation of an adjudication of bankruptcy, Re Griffith, 3 De G. M. & G. 174; and this doctrine is as much applicable to joint as to several obligations. Consequently, if two partners are jointly indebted by simple contract, and one of them gives his bond for payment of the debt, the joint debt is at an end; Bassett v. Wood, 11 Vin. Ab. Exting. B. 8; and see Owen v. Homan, 3 Mc. & G. 407; Ex parte Hernaman, 12 Jur. 642; and if the creditor obtains judgment against one of the partners only, he loses his remedy against the others; King v. Hoare, 13 M. & W. 494; Ex parte Higgens, 3 De G. & J. 33; unless, perhaps, in the case where they are abroad, and cannot, therefore, be sued here with effect. See as to this, Ex parte Waterfall, 4 De G. & S. 199. A colonial judgment creates no merger, Bank of Australasia v. Nias, 16 Q. B. 717. With respect to obligations which are joint as well as several, there is more difficulty. A joint and several obligation, arising *ex delicto*, is extinguished by a judgment recovered against any one of the persons obliged; Brown v. Wooton, Cro. Jac. 73; Buckland v. Johnson, 15 C. B. 145; and see, as to the plea of another suit depending, Boyce v. Douglass, 1 Camp. 61; but, as regards joint and several obligations arising *ex contractu*, although a joint judgment against all the persons obliged, extinguishes the separate liability of each, for, *nemo debet bis vexari pro eadem causa*, yet a judgment obtained against one of them only does not extinguish the separate liability of the others. Ex parte Christie, Mon. & Bl. 352. In order that this effect may be produced the judgment must be satisfied. Higgen's case, 6 Co. 46 a; King v. Hoare, 13 M. & W. 494; and see Drake v. Mitchell, 3 East, 251. Further, if several persons are jointly liable, and one of them afterward gives a separate security on which judgment is recovered against him, this will not merge the prior joint liability. In the leading case of Drake v. Mitchell, 3 East, 251; see, too, Re Clarkes, 2 Jo. & Lat. 212; Ex parte Bate, 3 Deac. 358, where a joint and several debt was held not merged, so far as it was joint, by higher separate securities, three persons purchased a coal mine, and covenanted jointly to pay the purchase-money by installments. An installment being in arrear, one of the covenantors gave his own promissory note for part of the money due, and judgment was afterward recovered against him for the amount of the note in an action upon it. In a subsequent action on the covenant, brought against all three covenantors, for the recovery of the installment in question, it was held that, as the note was not accepted in satisfaction of any part of the plaintiffs' demand, the judgment recovered on the note merely extinguished the right to sue on the note itself, and did not affect the liability on the covenant so long as the judgment remained unsatisfied. The defendant who gave the note was in this case twice sued, viz., first, in respect of his separate liability on the note, and next, in respect of his joint liability on the covenant; but the liabilities being substantially different, the case is not in conflict with the rule *nemo debet bis vexari pro eadem causa*. Notwithstanding the undoubted rule that a bond or judgment merges any simple contract debt in respect of which it may have

is payment by both.[1] Payment by one of the obligors in a joint and several bond is payment by all.[2]

been given or obtained, this rule only applies if the simple contract debt existed first in order of time, and if the specialty creditor is the same as the simple contract creditor. So, that if a bond is given or a judgment is obtained (under a warrant of attorney), as a security for future advances, Holmes v. Bell, 3 Man. & Gr. 213, and the note there; or if a simple contract debtor gives a bond or confesses a judgment to a trustee for his creditor, Bell v. Banks, 3 Man. & Gr. 258; in such a case equity would probably follow the law, *ut res magis valeat quam pereat*, in neither of these cases will there be any merger. It must also be borne in mind that in equity the doctrine of merger does not apply to the same extent as at law; for in equity, if a joint bond is given for a pre-existing joint and several debt, the bond will itself be treated as joint and several. Bishop v. Church, 2 Ves. Sr. 100 and 371; Simpson v. Vaughan, 2 Atk. 31; and see, as to a judgment, Jacomb v. Harwood, 2 Ves. Sr. 265. Further, it is to be observed that merger does not, properly speaking, extinguish a debt; for, notwithstanding the fact that a debt is merged in a higher security, the merged debt is sufficient to support an adjudication of bankruptcy against the debtor. Re Griffiths, 3 De G. M. & G. 174, and the cases there cited. Again, proof in bankruptcy against the estate of one partner in respect of a partnership debt is not equivalent to a judgment and does not preclude the proving creditor from afterward suing the solvent partners, and recovering from them what he may have failed to obtain in the bankruptcy. Whitwell v. Perrin, 4 C. B. (N. S.) 412; Bottomley v. Nutall, 5 id. 122. If a person loans money for the use of a firm, and accepts the note of one partner, he cannot maintain an action against the firm. If a party, who accepts the note of one partner is ignorant that the loan is for the firm, he cannot maintain an action against the firm after he has recovered a judgment against the partner on the note. A judgment against partners and others jointly is a several claim as against the bankrupts, and cannot receive a dividend from the joint estate. If the declaration of a dividend on a particular claim was unauthorized, the assignee may withhold its payment. In re Herrick and Herrick, 13 Nat. Bankr. Reg. 312.

[1] Cheap v. Cramond, 4 B. & A. 663.

[2] Bac. Abr. Obligation, D. 4.

CHAPTER XXVII.

OF THE RIGHTS OF PARTNERS AGAINST THIRD PERSONS.

SEC. 645. Contract gives no new rights to individuals.
SEC. 646. Limits of right.
SEC. 647. Under sealed instruments — Bonds — Rule in Wright v. Russell.
SEC. 648. Rule in Barclay v. Lewis.
SEC. 649. Barclay v. Lewis overruled by Barker v. Parker.
SEC. 650. Rule in Strange v. Lee.
SEC. 651. Bond for repayment of money advanced by firm or either member of, does not protect advances by survivor.
SEC. 652. Rule as to bond to cover bills drawn by firm.
SEC. 653. Effect of death or retirement of partner upon bond of indemnity to firm.
SEC. 654. Effect upon such bonds when firm is afterward incorporated.
SEC. 655. Same principles applied in equity — Pemberton v. Oakes.
SEC. 656. Introduction of new partner — Effect of, on such bonds.
SEC. 657. Bond may be made so as to cover fluctuations and changes in composition of the firm.
SEC. 658. Who may recover on bond given to firm in firm name.
SEC. 659. Bonds to companies, not affected by changes in members of.
SEC. 660. What submission to arbitration covers — Garland v. Noble.
SEC. 661. Power of attorney given to one member — Effect of.
SEC. 662. Rights of partners under unsealed contracts. Rule in Ex parte Garland.
SEC. 663. Guaranty given to one partner, not guaranty to firm.
SEC. 664. Simple contracts may be enlarged or explained by construction. Ex parte Kensington.
SEC. 665. Guarantees given to one partner may in some cases be extended to firm — Garrett v. Handley.
SEC. 666. Alexander v. Barker.
SEC. 667. Bills and notes, generally security only to one to whom payable — Exceptions.
SEC. 668. Rule when contract by mistake fails to express the intention of the parties.
SEC. 669. Rights of partners as to accounts current with their debtors — Bodenham v. Purchas.
SEC. 670. Bodenham v. Purchas questioned in Jones v. Maud.
SEC. 671. Of extinction of rights. Payment to and release by one partner. Effect of.

SEC. 672. Payment to one partner — King v. Smith.
SEC. 673. Distinction when the debtor owes both the partner and the firm.
SEC. 674. Judgment taken by one of two joint creditors. Effect of.
SEC. 675. Payment to one of two firms that are partners in certain transactions.

Contract gives no new rights to individuals.

SEC. 645. The contract of partnership cannot give new rights to an individual.[1] On the contrary, it seems clear that there are certain rights which persons might possess as individuals, but which they would lose when united in a body as partners. For instance, although it has been said that partners might be very fit to conduct the *office* and *business* of executors, especially where money is to be collected in one country and remitted to another, yet, in the same case in which this remark was made, it was held clearly, and with great justice, that a firm which had been appointed executors had no claim, in the same manner as individual executors, upon the residue undisposed of by the will.[2]

It frequently, however, happens that under the express provisions of certain statutes the rights of partners are especially provided for. Hence by the statute law, persons trading jointly are more advantageously situated with respect to the payment of duties than if they each traded separately.[3] Again, also, by a statute, partners may equally with individuals sue out a fiat upon a petitioning creditor's debt of 100*l*.[4] And, even where a statute does not contain provisions in favor of partners, the restrictions which it imposes on the sole trader may possibly not affect him in the situation of partner. Thus, in Raynard v. Chase,[5] the provisions of the statute 5 Eliz., c. 4,

[1] But see 6 Rep. 1. Solicitors, by reason of their peculiar business, possess some privileges, and are affected with some disabilities which do not appertain to other partners. But this is entirely for the benefit of their clients. Thus, where a partnership has expired by effluxion of time, and in a suit for an account, etc., a receiver has been appointed before decree, the court will not compel the defendant, the former managing partner, to deliver up to the receiver, for the purpose of making out bills of costs, partnership books and accounts which have remained in his hands, and title deeds belonging to a third party, which came into the possession of the copartners as solicitors, such defendant offering the receiver free access thereto, and to assist in making out the bills. Dacie v. John, M'Clel. 206. On the other hand, solicitors in partnership cannot dissolve their partnership, as against their client, without his consent, so as to enable the retiring partner as discharged to act against him. Cholmondeley v. Clinton, 19 Ves. 273. On the same principles where one of two solicitors, who were partners, became bankrupt, and the assignees excluded the other from interfering with the affairs of the partnership, the court nevertheless refused to order the assignees to deliver to him the papers belonging to the clients of the firm. Davidson v. Napier, 1 Sim. 297.

[2] De Mazar v. Pybus, 4 Ves. 644.

[3] 11 Geo. 4 & 1 Will. 4, c. 64, § 10, and 1 and 2 Will. 4, c. 32, § 21.

[4] 6 Geo. 4, c. 16, § 15; 1 and 2 Vict. c. 110, § 8.

[5] 1 Burr. 2; 2 Wils. 40. But these provisions f the statute of Eliz. are repealed by 54 Geo. 3, c. 96.

which restrained all persons from using a trade unless they had been apprenticed to it for seven years, were held not to extend to any partner who was not a working partner; for it was the policy of the act to have trades carried on with skill, and this construction was not contrary to that policy.

We have seen that where partners have contracted with third persons they cannot, by their *own acts alone*, alter the extent of their liability or acquire any new rights at variance with the contract into which they have entered. It is true that by their power to convert joint into separate property, and *vice versa*, the interests of different classes of their creditors may, in the event of their bankruptcy, be changed or even annihilated; but this state of things arises, not from any right which the partners have against their creditors, but because the fiat is a general execution for all the creditors who avail themselves of it, and it is a rule of convenience that the distribution shall take place according to the several interests and equities of the partners as amongst themselves.

The only points, therefore, which demand our consideration in the present chapter are: 1. The *limits* of the rights of partners under contracts with third persons; and, 2. The *extinction* of the rights of partners by the acts of their copartners.

Of the limits of right.

SEC. 646. The rights of partners, under a particular contract, must be measured by the express terms of the contract, whether it be contained in an instrument under seal, or a written agreement without seal; or whether it exist only by parol. Such contract, therefore, as we shall see in a variety of instances, will extend only to the partners named, or such as are comprehended in a well-known general name at the time of the contract. Where, however, the instrument is not under seal, evidence may be given that the contract was subsequently enlarged, so as to embrace incoming partners, or to give a new right to remaining partners, according to circumstances.

Under sealed instruments — Bonds — Rule in Wright v. Russell.

SEC. 647. Let us first consider the limits of the rights of partners under sealed contracts.

Where a bond is given to a firm, without any provision for a change taking place in the firm, the rights of the partners under this bond will cease, as to all *future* matters, upon the incoming, retirement, or death of a partner. The first case which establishes this doctrine

is that of Wright v. Russell,[1] which is relied upon by Lord Kenyon in Myers v. Edge, his Lordship saying — "I very much approve of the case cited from Wilson."

To be sure, in Wright v. Russell, the obligee was *sole*, and afterward took a partner, but the principles established by that case are equally applicable to co-obligees. It was an action of debt on a bond conditioned for the faithful service of one W. Baird, as broad clerk to the plaintiff, a brewer. The defense set up by the second plea was that the plaintiff was a sole trader at the making of the bond, and so continued till the 26th of December, 1771, and no longer; and the service intended by the condition was only meant to be performed while he continued sole and without a partner; that the plaintiff, on the 26th of December, 1771, entered into partnership with one Delafield, which still continued; that Baird quitted the service of Wright when he ceased to be a sole trader, and then entered into the service of Wright & Delafield; and that he behaved faithfully during his service of Wright while sole. The plaintiff replied that Baird was never discharged from his office either by him or his copartner, and assigned a breach of trust, by embezzlement, in August, 1772. The Court of Common Pleas, however, held the plea to be good, and gave judgment for the defendant. De Grey, C. J.— "The law is, that the surety shall not be bound beyond the scope of his engagement, as understood at the time he entered into it: where there is the least difference between the condition and the breach assigned, the surety will not be bound. Here Wright takes a clerk, when sole, with security for his good behavior in his service; he then, by his own act, takes in a partner. From that moment the suretyship is at an end. If there is one, there may be twenty partners taken in. Is the surety liable, if Baird disobeys the orders of any one of those partners? Is Baird to be subject to all the obligations that arise from his new service, and the surety answerable for all? Or can the surety be called upon to insure the money of all the partners? Certainly not."[2]

Rule in Barclay v. Lucas.

SEC. 648. A different decision was afterward given, in the case of Barclay v. Lucas,[3] where Lord Mansfield is reported to have held such

[1] 3 Wils. 532; 2 W. Bl. 934.

[2] Upon the same principle it has been held that where the obligor of an indemnity bond takes a partner with the knowledge of the obligee, the surety is released. Bellars v. Ebsworth, 3 Camp. 53.

[3] 1 T. R. 291.

bonds to be undertakings rather to the house than to the individual partners of it, and, therefore, not to be discharged by any change of partners. The facts of that case were similar to those of Wright v. Russell, except that the bond was originally given to the plaintiffs, who were partners, and not to an individual; and recited that the plaintiffs, at the recommendation of the obligors, had agreed to take one P. J. into their service and employ, as a clerk, in their shop and counting-house; and Mr. Justice Willis placed considerable reliance on this recital, as showing that the service was to be performed *in the shop and counting-house*, and *not* to the plaintiffs.

Barclay v. Lucas overruled by Barker v. Parker.

SEC. 649. But the case of Barclay v. Lucas seems to be no longer law, and Lord Mansfield himself decided otherwise, in Barker v. Parker.[1] In that case he held that a bond, with condition that a clerk should serve faithfully, and account for all money, etc., to the obligee and his executors, did not make the obligor liable for the money received by the clerk in the service of the executors of such obligee, who continued the business, and retained him in the same employment. But Lord Mansfield observed, that there was a material distinction between such a case and that of Barclay v. Lucas, in which the same trade was carried on by the original masters in the same manner, and the only difference was the introduction of a new partner.

Rule in Strange v. Lee.

SEC. 650. Since Lord Mansfield's time, the courts have adhered entirely to the principles of Wright v. Russell. Thus, in the case of Strange v. Lee,[2] a bond was entered into by one Blyth and the defendant Lee, conditioned for the payment by the co-obligors, their executors, etc., to Walwyn, Strange & Co., bankers, or either of them, of all sums of money which should become due to them from Blyth, for money advanced, etc. Walwyn died.[3] The Court of King's Bench held that upon this event the obligation ceased, and did not cover advances made to Blyth after that period, and that, therefore, the surviving partners of Walwyn could not bring an action on the bond, in respect of any such advances. Lord Ellenborough — "The court will no doubt construe the words of the obligation according to the intent of

[1] 1 T. R. 287.
[2] 3 East, 434.
[3] A new partner was taken into the firm on Walwyn's death, but nothing turns upon this fact in Lord Ellenborough's judgment.

the parties, to be collected from them, but the question is, what that intent was. The defendant's obligation is to pay all sums due to them, on account of their advances to Blyth. Now, who are 'them' but the persons before named, amongst whom is James Walwyn, who constituted the banking-house, and with whom the defendant contracted? The words will admit of no other meaning, and, indeed, with respect to any intent which parties entering into contracts of this nature may be supposed to have, it may make a very material difference in the view of the obligor, as to the persons constituting the house at the time of entering into the obligation, and by whom the advances are to be made to the party for whom he is surety; for, a man may very well agree to make good such advances, knowing that one of the partners, on whose prudence he relies, will not agree to advance money improvidently. The characters, therefore, of the several partners may form a material ingredient in the judgment of the obligor upon entering into such an engagement. I consider this question concluded by the cases of Arlington v. Merrick,[1] Wright v. Russell, and Barker v. Parker."

Bond for repayment of money advanced by firm or either member of, does not cover advances by survivor.

SEC. 651. So, where a firm of bankers, five in number, took a bond conditioned for the repayment "to them of any money advanced by them five, or any or either of them," it was held that this bond did not extend to sums advanced by the survivors, after the death of one of them. "The words of the condition," said Mansfield, C. J., "again and again refer to the obligee's capacity of bankers, they were bankers only as they were partners in the banking-house, as it is called, and this security is conditioned to pay any money advanced by them five, or any or either of them." Taking those last words by themselves, it might at first be conceived, that, if any of the five advanced money, this bond should secure it, but the words are afterward explained, where it is seen that the money is to be paid to the five. Now, it could never be intended that money advanced by one of them should be repaid to the five, and this shows that the words, "advanced by them, or any or either of them," must be confined in

[1] 2 Saund. 412. In Arlington v. Merrick, it was held that the condition of the bond should be restrained by the recital. There the terms of the condition were indefinite, and those of the recital definite. In the case of Strange v. Lee, stated in the text, there was no material difference between the recital and the condition. In all cases, the apparent intention of the parties, and not any invariable rule of law, will govern the construction of the instrument. See Sanson v. Bell, 2 Camp. 39; and see 2 Wms. Saund. p. 415 a, note c.

their meaning to money advanced by any or either of them, in their capacity of bankers, on behalf of all the five.[1]

Bond for repayment of money drawn upon bills does not cover bills drawn by survivor.

SEC. 652. So, conversely, where one firm of bankers took from another firm of bankers, namely, A & B, a bond conditioned for the repayment of all sums of money for which they, A & B, or either of them, should draw upon the obligees by means of bills, it was held that this bond did not extend to a bill drawn by B after the death of A.[2]

Effect of death or retirement of partner upon bond of indemnity.

SEC. 653. So, where the condition of a bond recited that the Chancellor, Masters, and Scholars of the University of Cambridge had appointed A, B, & C their agents, for the sale of books printed at the University Press, and that the defendant had offered to enter into a bond with them as surety, and it was conditioned by such bond that if the said A, B & C, and the survivors and survivor of them, and such other person and persons as should or might at any time or times thereafter in partnership with them or either of them, act as agent or agents of the said Chancellor, etc., or their successors, for the sale of books as aforesaid, did and should duly account to the said Chancellor, etc., for all books delivered or sent to them, or any or either of them for sale as aforesaid, and should pay all moneys which should become payable to the said Chancellor, etc., in respect of such sale, then the obligation should be void; it was held that by the retirement of C, from the partnership of A, B & C, the defendant, as their surety, was discharged from all further liability on this bond.[3]

Bond conditioned for good behavior of collector of firm ceases to be operative if firm is incorporated.

SEC. 654. Agreeably to the principles of Strange v. Lee, and the other various cases just cited, where a bond was given to certain persons and their successors as Governors of the Society of Musicians, conditioned for the good behavior of their collector, and the society was subsequently incorporated, and after that period the collector committed a fraud, it was held that the society had no longer any remedy under the bond because of the utter change in their constitution.[4]

---

[1] Weston v. Barton, 4 Taunt. 673. And see Thomas v. Da Costa, 2 Moore, 386; Ex parte Watson, 19 Ves. 459.

[2] Simson v. Cooke, 1 Bing. 452.

[3] University of Cambridge v. Baldwin, 5 M. & W. 580.

[4] Dance v. Girdler, 1 N. R. 94.

Principles applied in courts of equity—Pemberton v. Oakes.

SEC. 655. The principles of these decisions have been acted upon in courts of equity. Thus, in Pemberton v. Oakes,[1] B. Stokes, Pemberton, and G. Stokes, by an indenture of the 4th of January, 1802, covenanted jointly and severally with Harding, Oakes & Willington, their executors, administrators and assigns, that they, B. Stokes, Pemberton, and G. Stokes, or some or one of them, or some or one of their heirs, etc., would pay to Harding, Oakes & Willington, or to the survivors or survivor of them, or to the executors, etc., of such survivor, upon demand all sums of money not exceeding 20,000*l.* which then were or should at any time thereafter, before and until the 19th of February, 1807, become due and owing from B. Stokes to Harding, Oakes & Willington, or to the survivors or survivor of them, or to the executors or administrators of such survivor either for principal money then already lent or advanced or thereafter, within the time aforesaid, to be lent and advanced; or for interest then due or to become due thereon, or for money then already paid or lent, or thereafter, within the time aforesaid, to be paid or lent by Harding, Oakes & Willington, or the survivors or survivor of them, or the executors or administrators of such survivor, to B. Stokes or to his order, or for his own use, etc. Harding died in March, 1802, having by virtue of a power reserved to him in the partnership articles bequeathed his share of the business to his executors in trust for his children. The business was accordingly carried on by the executors, conjointly with Oakes & Willington. It was contended that by the introduction of the executors into the firm, no new partnership was created, and, therefore, that the indenture of January, 1802, was a security for moneys advanced to B. Stokes, by Oakes, Willington, and the executors of Harding. But Lord Lyndhurst held clearly that the partnership with the executors was a new partnership, and, therefore, that the instrument did not extend to moneys advanced by such new partnership, as it could not apply to advances made by a firm consisting of Oakes, Willington, and another person, who was not a member of the firm on the 4th of January, 1802.

Effect of introduction of new member upon securities given for indemnity of the firm.

SEC. 656. If an instrument be made to partners, their heirs and assigns, for the purpose, by mortgage or otherwise, of securing debts due or to become due to them, and afterward a nominal partner is

[1] Pemberton v. Oakes, 4 Russ. 154.

introduced into the firm, and, after his accession, further advances are made by the firm to the debtor, it may be a question how far such subsequent advances are secured by the deed, and whether any distinction is to be drawn between this case and the preceding, from the circumstance of the incoming partner being only nominal. In a case where, after such accession by a nominal partner and subsequent advances, the firm became bankrupt, it was contended that the assignees had a right to repayment in respect of such subsequent advances, on the ground that had the firm remained solvent, they might have maintained an action for the advances exactly as if there were no nominal partner. Lord Eldon treated the point as doubtful, observing that the assignees would have great difficulty in supporting an action, but there was authority enough if they chose to try it. He added, that if this could be established as an equitable demand, contradistinguished from a legal demand, they would find it very difficult to make out a case under these circumstances, without filing a bill.[1]

Bond may be made to indemnify past or future partners.

SEC. 657. But a bond or other instrument may be drawn so as to make the obligor or covenantor answerable not only to the present, but to all future partners in the house.[2] Hence, in a bond, it is usual to word the condition thus: "That A B shall well and truly pay to the said C D, E F, and G H, or any of them, associated or not with any other person or persons in the same or any other firm, the amount of all such sums as the said A B shall draw on (or, as at any time hereafter shall be due from the said A B to) the said C D, E F, and G H, or any of them, associated or not, as aforesaid."[3]

Who may recover on bond given to the firm by firm name.

SEC. 658. In the preceding cases the bonds were uniformly given to the existing partners by their respective names. But where a bond is given to a firm, by the name which it has used for many years, without alteration, evidence may be admitted to prove to what individuals trading under that name the bond was given. Consequently, those partners to whom the bond was in fact given, may recover in an action on the bond, although the bond does not appear on the face of it to have been made to them in particular, but to the firm by its general name. Thus, in an action on a bond, the bond being read, it appeared

[1] Ex parte Watson, 19 Ves. 459.
[2] Per Lawrence, J., in Strange v. Lee, *supra*.
[3] Simson v. Ingham, 2 Barn. & Cres. 65, 2 Dowl. & Ryl. 249; Simson v. Cooke, 1 Bing. 452.

that the defendant thereby bound himself to the "widow Moller and Son." It was proved that the widow Moller had been dead some years before the execution of the bond, and that the plaintiffs, her sons, had since continued to carry on trade under the old firm. On its being objected that, although a bill of exchange or a promissory note might be given to a mercantile firm, yet, in such a solemn instrument as a bond, the names of the obligees must be specifically mentioned, Mansfield, C. J., thought it was enough if the plaintiffs were proved to be the persons meant by the widow Moller and Son: and they had a verdict accordingly.[1]

Bonds given to company to indemnify against misconduct of clerk good, notwithstanding changes in the company.

SEC. 659. Where a bond is given to the trustees of a trading company, conditioned to secure the faithful services of a clerk to the company, this bond will remain in full force so long as such clerk acts in such capacity, and notwithstanding the fluctuations of the company.[2]

What submission to arbitration covers—Garland v. Noble.

SEC. 660. Where a submission to arbitration is made of all matters in difference between the parties, and one of the parties consists of a partnership firm, the submission embraces only matters in difference between the partnership jointly and the other party and not between the partners severally and the other party. Therefore, a submission of this kind will not inure to the benefit of one partner only. In the case of Garland v. Noble,[3] an action was brought against certain persons, who were partners in Malta, and the plaintiffs proceeded to and obtained outlawry. Afterward, upon the dissolution of the partnership, one of the defendants arrived in London, and was arrested by virtue of a *capias ut lagatum*, and imprisoned. The outlawry was reversed, and a bill in Chancery was filed by both the defendants against the plaintiffs for a discovery, in which the action and the outlawry were stated. The cause was referred to an arbitrator, and a submission was entered into in form above mentioned; the arbitrator heard evidence of the matters relating to the action, but refused to hear claims for damages sustained by both the defendants, by reason of the outlawry, being of opinion that the submission, which was of all matters between the parties, meant of all

[1] Moller v. Lambert, 2 Camp. 548.
[2] Metcalf v. Bruin, 12 East, 400; 2 Camp. 422.
[3] 1 Moore, 187.

matters between the plaintiffs respectively on one side, and both, not *one*, of the defendants on the other; and that no actual damage had been sustained by the defendants jointly. And the Court of Common Pleas were of that opinion.

Power of attorney given to one partner, effect of.

SEC. 661. A power of attorney given to one of two partners will not inure to the benefit of the other partner.[1]

Rights of partners under unsealed contracts—Rule in Ex parte M'Gae.

SEC. 662. The limits of the rights of partners, under parol or unsealed written contracts, are determined by the same rules as those which we have endeavored to explain in regard to sealed contracts. These rules may in fact be said to apply to every species of particular arrangement made by a creditor with the firm with which he deals. In Ex parte M'Gae,[2] A, having a banking account with a firm of bankers, and being in the habit of receiving bills of exchange from the captains of certain vessels, agreed with the bankers to pay all such bills into their bank, indorsing them, and to take out in exchange their promissory notes, they allowing him, as a consideration for such issue of their notes, twenty-four days' interest on each bill paid in. Commissions of bankrupt having issued against three of the partners, it was held that the contract was at an end, and, consequently, that the assignees, under a subsequent joint commission against all the partners, could not retain bills paid after the bankruptcy of the three. Lord Eldon observed that A's proposal was to deliver the bills to the four bankers, and not to one of them and the assignees of the others, and that they should give the promissory notes of the house, but that in this case he did not receive the consideration contracted for, when he received a promissory note purporting to be the security of the four, but which was, in truth, only that of one.

So, where A deposited with his bankers several deeds, and signed a memorandum, addressed to Messrs. X, Y, & Z, bankers, stating that he had deposited the deeds "as a collateral security for the balance of any sum or sums of money which you may at any time advance for my account, and which I hereby oblige myself, my heirs or executors, to assign in a legal manner, whenever required so to do," Lord Eldon held that this deposit and agreement alone, without any further agreement, did not extend to advances afterward to be made by the house, whenever the partners should be changed.[3]

[1] Edmiston v. Wright, 1 Camp. 83.
[2] 19 Ves. 607; 2 Rose, 376.
[3] Ex parte Kensington, 2 Ves. & Bea. 79.

Guaranty given to one partner not a guaranty to the others.

SEC. 663. Upon the same principles, a *guaranty* given to the whole firm shall not, *prima facie*, inure to the benefit of the remaining partners. In the case of Myers v. Edge,[1] the plaintiffs, Myers, Fielden, and others, partners, brought their action against the defendant, to recover the value of a quantity of cotton twist, supplied by them to one Duxbury on the guaranty of the defendant. At the trial the plaintiffs put in the following letter as evidence of the contract: "To Messrs. Myers, Fielden, Ainsworth & Co. If you please, you may let the bearer, Thomas Duxbury, have six bunches of twist more than I told you, and I will be answerable for them, as before," etc. At the time this engagement was entered into, Ainsworth was a partner with the plaintiffs, but the goods in question were furnished to Duxbury by the plaintiffs alone, after Ainsworth had retired from the partnership. It was objected, on the part of the defendant, that this action could not be maintained by the present plaintiffs, because the contract was made, not with them alone, but with them conjointly with Ainsworth, and the Court of King's Bench were of that opinion, Lord Kenyon observing that perhaps the defendant, when he entered into this contract, had great confidence in Ainsworth, and thought that he would use due diligence in enforcing payment of the goods from Duxbury regularly as they were furnished, at least it was too much for the court to say that, after Ainsworth ceased to be a partner, the defendant would have given the same credit to the remaining partners, the court could not say that a contract, that on the face of it imported to have been made with five, ought to be construed to be a contract made with four persons only.

It was decided in a late case that a guaranty which had been given to the firm of A & B, was put an end to by the retirement of C, a *dormant* partner, but it is conceived that when the contract was made the guarantor must have known of the existence of the dormant partner, otherwise this decision seems questionable.[2] It is clear, however, that where even a parol contract of a continuing nature is entered into with a person who has a dormant partner, the contract will not inure to the benefit of such *dormant partner* after the retirement of the ostensible partner. In Robson v. Drummond,[3] A, a coachmaker, entered into an agreement to furnish B with a carriage for the term of five years, at seventy-five guineas a year. At the time of making

[1] 7 T. R. 254.
[2] Dry v. Davy, 2 Per. & Dav. 249; 8 Jur. 315.
[3] 2 B. & Ad. 303.

the contract C was a partner with A, but this was unknown to B, the business being carried on in the name of A only. Before the expiration of the first three years, the partnership between A and C was dissolved, A having assigned all his interest in the business, and in the contract in question, to C, and the business was afterward carried on by C alone. B was informed by C that the partnership was dissolved, and that he, C, had become the purchaser of the carriage then in his, B's, service. The latter answered that he would not continue the contract with C, and that he would return the carriage to him at the end of the then current year, and he did so return it. An action having been brought in the names of A and C against B, for the two payments which, according to the terms of contract, would become due during the last two years of its continuance, it was held that the action was not maintainable, the contract being personal, and A having transferred his interest to C, and having become incapable of performing his part of the agreement.

Simple contracts may be enlarged or explained by liberal construction or by the contract itself — Ex parte Kensington.

SEC. 664. But there are many cases in which unsealed contracts may be enlarged or explained, either by a liberal construction of the contract itself or by evidence of matters *dehors* the contract. The effect, therefore, of such construction or evidence may be to enlarge the rights of partners seeking the benefit of such contracts, so as to give them a remedy adapted to the various changes of the firm. Thus, it has been held that *equitable mortgages*, though evidenced by a written memorandum, may be enlarged even by parol.[1] When, therefore, such a mortgage is made by the members of a firm, if upon the affidavit and examination taken together, aided by the extreme probability of the intention of the parties, it can be collected that what was originally deposited for one purpose should be held as deposited also for another, with reference to the demand of the subsequent partners, such an enlargement of the original mortgage, though by parol, will be sufficient. In the case of Ex parte Kensington, before adverted to, after the mortgage to X, Y, & Z, together with the agreement as before stated, a bond was executed by the mortgagor to the same person conditioned for payment to them, and in case of any alteration taking place in their firm, then to the persons composing a new firm, if comprising two of the original members,

[1] That legal mortgages cannot, see Ex parte Hooper, 1 Rose, 328.

of all sums thereafter lent by them to the mortgagor. X afterward retired and the question was, whether the deposit of title deeds with the agreement could be held by Y and Z as a security for advances made by them to A after the retirement of X, and Lord Eldon held that they could.

The same principles were acted upon in a subsequent case,[1] in which a security given to a firm by means of a memorandum and deposit of title deeds was continued after an alteration in the members of it, upon the construction of a letter raising an agreement to that effect. So in a more recent case, where title deeds were deposited by way of security with a firm upon a verbal agreement, it was held that the deposit might be extended by a subsequent verbal agreement entered into upon a change of partners for the security of a new sum.[2] So, where an equitable mortgage was made to a firm of five, one of whom was a nominal partner only, it was held to be extended by subsequent agreement to the actual partnership of four.[3] So, where A, B, C, & D, being bankers and partners, and D being the son of C, a customer of the firm executed a legal mortgage to A, B & C, to secure the balance due from him to the firm, and afterward addressed a letter to Messrs A, B & C, authorizing them to consider all the securities they then held, as responsible for any advances made or to be made by them to the customer; upon the bankruptcy of the customer it was held that this letter must be taken to have been addressed by the bankrupt to the *four* partners, and amounted to an equitable mortgage to the four of the previous legal mortgage to the three, and that it operated as a security for all the advances made either by the three or the four.[4]

Guaranties given to one partner may in some cases be extended to firm — Garrett v. Handley.

SEC. 665. *Guaranties* are another species of contract which it seems are not to be construed strictly according to the letter, but according to what appears generally on the evidence to have been the intention of the parties, and in the absence of much evidence on this head then most strongly against the guarantor.[5] Of guaranties it is evident, notwithstanding what has been already said, that circumstan-

[1] Ex parte Marsh, 2 Rose, 239. And see Ex parte Lloyd, 3 Des. 305.
[2] Ex parte Lloyd, 1 Glyn & Jam. 389.
[3] Ex parte Alexander, 1 Glyn and Jam. 409.
[4] Ex parte Parr, 4 D. and C. 426.
[5] See the observations of Park, J., in Hargrave v. Smee, 3 Moore & Payne, 584, and of Lord Tenterden in Davey v. Prendergress, 5 Barn. & Ald. 192.

ces may arise which may very much enlarge the rights of partners to whom a guaranty has been given.

Thus, sometimes, a guaranty, though given only to one partner, may inure to the benefit of the whole firm. In Garrett v. Handley,[1] the plaintiffs, Garret and Bodenham, surviving partners of Phillips, brought their action against the defendant, on the following letter written by the defendant to Garrett: "Sir — I understand from Mr. Gibbons that you had the goodness to consent to advance 550*l.* to discharge immediately a like sum, for which he became security for his cousin, Mr. T. Gibbons, upon my assurance, which I hereby give, that provision shall be made for repaying you this sum under the arrangement now going on for the settlement of Mr. Gibbons' concerns." In consequence of the assurance given in this letter the money was advanced by Bodenham & Co. to Gibbons. At the trial the plaintiffs produced a correspondence between Bodenham & Co. and the defendant, for the purpose of showing that the guaranty contained in the letter, though in terms given to John Garrett, one of the plaintiffs, was intended for the benefit of the firm. Upon the case being argued before the Court of King's Bench, they were of opinion, from perusal of the correspondence, that the guaranty was intended for the benefit of the firm, and not of Garrett alone; and consequently that, corroborated as it was by such correspondence, it was available to the surviving partners.

So, in a case at *Nisi Prius*, Gaselee, J., held that a guaranty given to one of two partners, for goods sold by them in the way of their trade, would inure for the benefit of both; there being evidence that the partners did not carry on any separate trade. And he likewise ruled that a guaranty without an address would inure to the benefit of those to whom or for whose use it was delivered.[2]

Alexander v. Barker.

SEC. 666. On the authority of the case of Garrett v. Handley, which has been just cited, it was held in Alexander v. Barker,[3] that where a person by letter applies to an individual partner in a banking-house for a loan of money, and undertakes to that partner to repay it, and the partner in consequence of such letter advances the money out of the partnership funds, such contract inures to the benefit of the whole banking firm, so as to enable them to sue jointly upon it. But

[1] 4 Barn. & Cres. 664; 7 Dowl. & Ryl. 144.

[2] Walton v. Dodson, 3 Car. & P. 162.

[3] 3 Crom. & Jerv. 133.

in this case it was the opinion of the court that the situation of the lender as one of a firm of *bankers* made it incumbent on the borrower, if he meant to rely on a several contract, to show expressly that when he applied for the advance he agreed to be answerable to no other persons than the individual lender. In other cases it is apprehended that the *onus probandi* would be the other way; and that partners, who insisted on a joint loan, where the money had been advanced by an individual partner only, would be bound to show that the borrower, at the time of the contract, agreed to be answerable to the partnership, and not merely to the lender of the money. In Sims v. Bond,[1] a question of this description was decided as to part-owners, and there seems to be no material distinction upon this point between part-owners and partners. There A, the managing owner of a vessel, was permitted by the other owners to have the possession of two warrants or orders of the East India Company to pay to the said owners, or bearer, the sum of money therein mentioned, for freight. A deposited these warrants in the hands of his bankers, and they received the money due on them and gave him credit for it, in an account opened in their books in his name only. It was held in *assumpsit* brought after A's death, by the surviving part-owners, against the bankers, that on proof of these facts they could not recover the money; because it was not shown that the loan was on their account; and that the fact of the warrants being the property of all the part-owners, when placed in the banker's hands, was upon the evidence quite consistent with the supposition that the loan of the proceeds to the bankers was A's loan.

It is apprehended, however, that in cases of this nature express proof of a joint contract would not be necessary in an action brought by a firm of which the partners were all dormant but the lender.

Bills and notes generally security only to one to whom it is payable — Exceptions.

SEC. 667. A *bill* or *note* given to a firm is a security only to those to whom it is made payable; but it may be so framed as to comprehend future as well as present partners; and for that purpose it seems to be sufficient to make the bill or note payable to the partners or *their order*. In the case, however, where this appears to have been decided, there was strong extrinsic evidence that the note was intended to be a continuing security. It appeared that several changes

[1] 5 B. & Ad. 88; 2 N. & M. 608.

took place in the firm, and that on these occasions the note was transferred in account from the old to the new firm, and interest was paid by the debtor from time to time to the different firms, as if it was a debt due to the persons successively constituting that firm.[1]

Rule when the contract by mistake is different from the intention of the parties.

SEC. 668. We may observe, by way of conclusion to this part of our subject, that where the written contract differs by mistake from that which the parties intended, and on which they have acted, they must be bound by the terms of the actual and not of the written contract. The defendant, Lapage, bought of the plaintiff, Mitchell, and others, through their broker, Metcalf, a quantity of hemp. The bought-and-sold notes made out by Metcalf ran thus:—"Bought for George Lapage, of Todd, Mitchell & Co., 38 tons of hemp, etc." It appeared that "Todd, Mitchell & Co." was the name of the old firm, which was dissolved in 1814, when Todd retired, but the dissolution was not published in the "Gazette," and at the time of making the contract, in March, 1815, Metcalf had no notice of the change in the firm. However, in August, 1815, the plaintiffs, who composed the new firm, sent the defendant a letter in the name of the new firm, advising him of the arrival of the hemp, which had fallen in price, and calling on him to fulfill his contract. The defendant then expressed a wish to the broker to be liberated from his bargain. He afterward refused to take the hemp, on the ground that the insertion of Todd's name avoided the contract. An action being brought by the new firm, it was urged by the defendant that they could not recover upon this contract; that the present plaintiffs never traded under the names of Todd, Mitchell & Co., the firm with which the defendant contracted; and that, having made a contract with one set of persons, he could not be prejudiced by having it adopted by another. But Gibbs, C. J., overruled the objection, observing, that this was only a mistake of the broker, and that the defendant had treated the contract as subsisting with the new firm, who had, therefore, a right to recover. It would have been otherwise, if the defendant had been induced to think that he had entered into a contract with one set of men, and not with any other; or if, owing to the broker, he had been prejudiced or excluded from a set-off.[2]

---

[1] Pease v. Hirst, 10 Barn. & Cres. 122. It appears by this case, that parol evidence may be admitted to enlarge the effect of a note, but that it is inadmissible for the purpose of contradicting it, see Morsley v. Hanford, 10 B. & C. 729; Price v. Edmunds, id. 581.

[2] Mitchell v. Lapage, Holt, 253.

Rights of partners as to accounts current with their debtors — Bodenham v. Purchas.

SEC. 669. The rights of partners under accounts current with their debtors will be limited according to the rules of calculation laid down in Clayton's case.[1] Therefore, when one of several partners dies or retires, and there is a balance due to the firm at that period, such balance will be gradually diminished by the sums paid in subsequently by the debtor, unless such sums be specifically appropriated at the time of payment. In the case of Bodenham v. Purchas,[2] the plaintiffs, Bodenham and Phillips, with Havard, carried on business in partnership as bankers. In January, 1804, they took a bond from the defendant, conditioned for the repayment of the balance of an account, and of such further sums as they might advance to the obligor. On the 31st March, 1810, Havard died. The defendant, during all the period between the execution of the bond and the death of Havard, kept an account with the plaintiffs and Havard, and usually balanced his account every three months. At the death of Havard the balance due from the defendant to the firm was 4,404*l.* 11*s.* 7*d.* At the end of that year Garrett was taken into the firm, and the style of the firm altered, but the accounts were continued in the same manner as before, and the balance carried forward, as if there had been no alteration in the firm. In June, 1813, the defendant relinquished his business, and his account was transferred to that of his sons. The sons' account continued open with the plaintiffs and Garrett till 1816, when they stopped payment. The balance at this time was 3,694*l.* 18*s.* 9*d.*, in favor of the plaintiffs. Of this balance the plaintiffs had received a composition of 15*s.* in the pound from the sons, but expressly without prejudice to their claim for the remainder, namely, 923*l.* 14*s.* 8*d.* from the defendant. The balance was never reduced below this sum of 923*l.* 14*s.* 8*d.*, which was now sought to be recovered from the defendant in an action on the bond. The case having been left to arbitration, the arbitrator was of opinion, on the authority of Clayton's case, that the balance due at the death of Havard must be considered as discharged by the first moneys paid in after his death, and, therefore, ordered the verdict to be entered for the defendant. The Court of King's Bench held the opinion of the arbitrator to be right.

It does not expressly appear in the foregoing case, whether the moneys paid in by the defendant after the death of Havard, were suffi-

[1] 2 Barn. & Ald. 89.

cient to cover the balance due at his death before the new partner, Garrett, entered the firm; but whether the fact were so or not would, according to the case of Pemberton v. Oakes,[1] be immaterial. There a customer was indebted to the firm of A, B & C, bankers, upon a running account. A died, and D became a partner in his stead. The account was continued, the customer making various payments to the firm of B, C & D. It was argued that these payments could not go in discharge of the balance due at A's death. That the account between the customer and the bank must be separated into two portions, and that it would be impossible to refer the items of credit in the latter account to the items of debit in the former, for that payments made to one partnership could not go in discharge of a debt due to another partnership. On what principle could the payments made to B, C & D be appropriated by the mere force of legal implication to the satisfaction of a debt due to A, B & C? Clayton's case had no resemblance to this. There the transactions of the customer were with the surviving partners of the old firm, here the dealings were, not with the surviving partners of the old firm, but with a new company consisting of those surviving partners and another person. But Lord Lyndhurst, C., held that the balance due from the customer at A's death was discharged by the subsequent payments to B, C & D. That point he said had been decided by Clayton's case, and Bodenham v. Purchas, and though the facts before him were not in every respect precisely the same with the circumstances of those two cases, yet the decisions in them proceeded on a broad general principle equally applicable to the state of circumstances in the principal case.

Bodenham v. Purchas questioned in Jones v. Maund.

SEC. 670. It may be doubted, however, upon a perusal of the case of Pemberton v. Oakes, whether the observations of those counsel, who argued against the reduction of the debt in the manner above stated, were satisfactorily answered by the learned judge; and in the recent case of Jones v. Maund[2] (in which, however, the case of Pemberton v. Oakes was not brought to the attention of the court), Lord Abinger, C. B., made a decision which is at variance with that of Lord Lyndhurst. The facts of that case, as admitted by demurrer, were these: A having dealings with B, C & D, who traded as coal merchants under the firm of B & Co., and having become indebted to them on several transactions, entered into a covenant with them for the payment of the whole amount. B & D afterward died, and C

[1] 4 Russ. 154. [2] 3 You. & Coll. 347.

retired from the firm and assigned her interest to E. The business of the firm was continued by E & F, under the firm of B & Co., and A continued his dealings with that firm, and made various payments to them. Upon a bill brought to restrain an action on the covenant by C, against A, C put in a general demurrer, and Lord Abinger allowed the demurrer upon various grounds, one of which was that the subsequent payments made by A, to E & F, could not be applied in reduction of the money secured by the covenant, unless it could be shown that C had assented to the arrangement.

It may be remarked that though in this last-mentioned case the partners were coal merchants, the bill treated the account as mutual, and in the nature of a banking account, and, therefore, there seems no material distinction as to the facts between this case and that of Pemberton v. Oakes.

Of extinction of right — Payment to and release by one partner—Effect of.

SEC. 671. We have already seen in considering the liabilities of partners under deeds, that the release by one partner of a joint debt is, at least in many cases, binding on the firm. It may here be added that if two partners commence an action one may release the subject-matter of it.[1] Hence, it has been expressly decided, that if one of two plaintiffs, partners, release a defendant after action brought, without the consent of the other, a court of law will not set aside such release unless fraud be clearly established.[2]

In this case, the partner who released the action had agreed, by the partnership deed, not to interfere in the receipt or payment of the partnership debts; and this circumstance alone was not deemed sufficient to make the release fraudulent. But where the release is attended with clear circumstances of fraud, the court will set it aside.[3]

It is, however, to be remarked that the power of one partner to give a release in these cases arises rather from the general practice in actions at law, than from the privileges of partnership. For it has been laid down generally that one plaintiff may release a cause of action brought by two.[4]

Where one of several partners gives a partnership bill, and undertakes to the acceptor to provide for it when due, this is in the nature

[1] Per Hullock, B., 1 Younge & J. 366.
[2] Arton v. Booth, 4 Moore, 192; Furnival v. Weston, 7 id. 356.
[3] Barker v. Richardson, 1 Younge & J. 365; and see Legh v. Legh, 1 Bos. & Pull. 447; Jones v. Herbert, 7 Taunt. 471; Mountstephen v. Brooke, 1 Chit. 391.
[4] Per Dallas, C. J., 4 Moore, 494; see Ruddock's case, 6 Rep. 256; Anon., 3 Mod. 109; Hackett v. Herne, 3 Mod. 135.

of a release to the acceptor, of any action which might have been brought by the partnership on the bill.[1] So, where one of several partners takes an acceptance for a debt previously due to the firm, this is giving time to the debtor, although the bill be drawn in the name of this partner only; and the firm cannot sue the debtor for the original debt until the bill has arrived at maturity and been dishonored.[2]

Payment to one partner—King v. Smith.

SEC. 672. Payment to one partner is payment to the firm.[3] Where, therefore, upon the dissolution of a partnership, an agent was appointed by both partners to receive the partnership debts, and one of the debtors promised to pay his debt to the agent, but, before any payment, one of the partners countermanded the authority which had been given, and required the money to be paid to himself, which was done—the Court of King's Bench held this to be a valid payment, observing that under the arrangement made by the partners payment to the agent might have been a good discharge, without barring either of the partners from their right to receive the money.[4] And in King v. Smith,[5] Tord Tenterden held that, after a dissolution of partnership between two partners, either party may receive a debt due to the firm, notwithstanding a stipulation in the deed of dissolution that one shall receive all the debts. His Lordship, therefore, ruled that, to an action brought by B against C, on a bill drawn by B and accepted by C, after the dissolution of the partnership of A and B, but for a debt due from C to that partnership, it was no answer for C to say that, by the terms of the dissolution, A only was to receive the debt of the firm.

In a late case,[6] A, being entitled to the sum of 4,500*l.*, charged on real estate, and payable at a future time, assigned the 4,500*l.* to B and C, who were bankers and copartners, to secure moneys to be advanced by them, or either of them, to A. C survived B. It was held that as the security was made to B and C jointly, C was capable of giving a discharge for the whole of the sums advanced, and that B's representatives were not necessary parties to the conveyance of the real estate on which the 4,500*l.* was charged.

[1] Richmond v. Heapy, 1 Stark. 202; Sparrow v. Chisman, 9 Barn. & Cres. 241; 4 Man. & Ryl. 206.

[2] Tomlins v. Lawrence, 3 Moore & Payne, 555.

[3] Anon., 12 Mod. 446; D. Tindal, C. J., 3 Moore & Payne, 555; Duff v. East India Company, 15 Ves. 198.

[4] Bristow v. Taylor, 6 M. & S. 156; 2 Stark. 50; but see Henderson v. Wild, 2 Camp. 561.

[5] 4 Car. & Payne, 108.

[6] Brasier v. Hudson, 9 Sim. 1.

If a debtor of a partnership, instead of paying what he owes, give one of the partners authority to receive moneys on his account, in confidence that they will be applied in satisfaction of his debt, retainer of these moneys by the partner receiving them is equivalent to payment.

Distinction when debtor owes both the partner and the firm.

SEC. 673. But, where a person is indebted to a firm, and also separately to one of the partners, payment to that partner is not payment to the firm, unless the money be specifically appropriated to such purpose. In a late case, one of two partners, solicitors, after the dissolution of the partnership, received the rents of a debtor to the firm, and retained out of them the amount of the debt, and he stated that he did this on an understanding that the debtor should have credit for the sum so retained, and that he considered the debt to have been satisfied by these moneys, but no account had been settled between him and the debtor — Lord Brougham held that, as against the other partner, the debt to the partnership was not to be considered as satisfied.[1]

Judgment taken by one of two joint creditors — Effect of.

SEC. 674. A judgment taken by one of two joint creditors does not extinguish the debt, unless it be clearly taken with the concurrence of both. Where, therefore, previously to the dissolution of a partnership, one of two partners took a warrant of attorney to himself alone from a debtor to the firm, and afterward, with notice of the debtor's insolvency, entered up judgment, levied execution on the debtor's goods, and received several sums of money from the sale of those goods, and died — it was held that this act of the deceased partner did not extinguish the debt as a joint debt, there being no evidence that the surviving partner had extinguished his power to receive, consequently, that the latter was liable to repay to the assignees of the debtor the money so received by the deceased partner.[2]

Payment to one of two houses that are partners in certain transactions.

SEC. 675. Where two houses are partners in a particular transaction, payment to one house, on account of that transaction, is payment to both. So, where two houses have a common partner, payment of a bill of exchange indorsed from one house to the other is in law payment to both, and, although one house is deprived of the benefit

[1] Per Sir John Leach, 1 Russ. & Myl. 101; Taml. 332.

[2] Pritchard v. Draper, 1 Russ. & Myl. 191.

[3] Biggs v. Fellows, 8 Barn. & Cres. 402; 2 Man. & Ryl. 450.

of such payment, it cannot sue the acceptor. In Jacaud v. French,[1] Blair and Jacaud were partners in Dublin, and Jacaud and Gordon were partners in London. The firm of Jacaud & Gordon shipped goods, effected insurances, accepted bills, and transacted the other affairs of the firm of Blair & Jacaud, and the firm of Blair & Jacaud from time to time made remittances to the firm of Jacaud & Gordon, to cover or answer their advances and acceptances. Farrell drew a bill upon French, payable to the order of Farrell, which was accepted by French, who indorsed it to Blair & Jacaud, who indorsed and remitted it to Jacaud & Gordon, the latter being under acceptances for Blair & Jacaud to a large amount. Before the bill became due, Farrell paid to the house of Blair & Jacaud several acceptances and notes for the express and specific purpose of liquidating and providing thereout for the due payment of the bill in question. It was also agreed between Blair, on the part of the house of Blair & Jacaud, and Farrell, that in case the bill should not be paid when due, it should be returned and delivered up to Farrell. The house of Blair & Jacaud applied to their own use the notes and acceptances so received from Farrell, and failed to take up the bill of exchange, and gave no notice to the house of Jacaud & Gordon, of the deposit or payment so made by Farrell. Under these circumstances the question was, whether Jacaud & Gordon could recover the amount in an action against the acceptor, French, and the Court of King's Bench held they could not. "It is impossible," said Lord Ellenborough, to sever the individuality of the person. Jacaud, being a partner with Blair, must be considered as having, together with Blair, received money from the drawers to take up this very bill. How then can he, because he is also partner with Gordon in another house, be permitted to contravene his own act, and sue upon this bill, which has been already satisfied as to him. If A and B, partners, receive money to apply to a particular purpose, A and C, in another partnership, can never be permitted to contravene the receipt of it for that purpose, and apply it to another."

[1] 12 East, 317.

CHAPTER XXVIII.

OF ACTIONS BY PARTNERS.

SEC. 676. General rights of partners to sue.
SEC. 677. Of parties to action *ex contractu*.
SEC. 678. Must have been partnership when contract was made.
SEC. 679. Distinction between specialties and simple contracts.
SEC. 680. Parties to actions on bills and notes.
SEC. 681. Right of action cannot be transferred when.
SEC. 682. Parties to actions on deeds.
SEC. 683. Dormant partners.
SEC. 684. Partners not known in firm.
SEC. 685. Infant partners.
SEC. 686. Bankrupt partners.
SEC. 687. Death of partner.
SEC, 688. Demurrer in case it appears there should be other parties.
SEC. 689. Of the parties to an action *ex delicto*.
SEC. 690. Of the declaration.
SEC. 691. Joint interest, joint action.
SEC. 692. Libel.
SEC. 693. Of pleas in bar.
SEC. 694. Of plea of bankruptcy.
SEC. 695. In actions on bonds.
SEC. 696. Tender.
SEC. 697. Former recovery.
SEC. 698. Statute of limitations.
SEC. 699. Proof of partnership.
SEC. 700. How proved.
SEC. 701. Nominal partners.
SEC. 702. Declarations of one partner.
SEC. 703. Proof of dissolution.
SEC. 704. Misjoinder may be shown under general issue.
SEC. 705. Evidence in actions for tort.
SEC. 706. Indictment by partners.
SEC. 707. Equitable remedies against partners.

General rights of partners to sue.

SEC. 676. From what has been said in the preceding chapter relative to the rights of partners against third persons, it is clear that, generally speaking, they possess as a body the same power as individuals have of enforcing those rights by action. In some respects, however, the power of partners to sue in an action *ex contractu* is not co-extensive with that of individuals. That power, we have seen,

may possibly be lost by the death or accession of a partner. So, also, where the same person is member of two different firms, an action of *assumpsit* cannot be brought by one person against the other, for, in such case, the same person would be both plaintiff and defendant in the same action, and it is a rule of law that a man cannot sue himself.[1] In the case of Mainwaring v. Newman,[2] A, B and C were partners, and C, D, and E were partners. E drew a promissory note in favor of C, D, and E, which was indorsed by them to A, B, and C. To an action of *assumpsit* by A, B, and C against D, as one of the indorsers, D pleaded in bar that C, one of the plaintiffs, was liable as an indorser together with D, and the plea was held good on special demurrer. So, also, after the death of the common partner, on general principles, one firm cannot sue the other for a debt due in his life-time, but they may upon transactions which have taken place subsequent to his decease.[3]

There is another particular in which the right of partners to sue in actions *ex contractu* appears to be limited. We have seen that the

[1] Bosanquet v. Wray, 6 Taunt. 598; Moffatt v. Van Millingen, 2 Bos. & Pull. 124; De Tastet v. Shaw, 1 Barn. & Ald. 664.

[2] 2 Bos. & Pull. 120, and see Jacaud v. French, 12 East, 317.

[3] Bosanquet v. Wray, *supra*.

As to firms having a common member, and actions at law and between partners. —We have already stated that one member could not sue a firm of which he was a member, as that would be to allow a party to be both plaintiff and defendant in the same action. And we have in previous notes indicated the circumstances under which a partner might bring an action against his copartners. We may here refer to the following numerical authorities in addition to those cited by Mr. Collyer, that one firm cannot maintain an action against another, where one of the partners is a member of both. Eastman v. Wright, 6 Pick. (Mass.) 320; Belknap v. Gibbons, 13 Metc. (Mass.) 471; Graham v. Harris, 5 Gill & J. (Md.) 489; Burley v. Harris, 8 N. H. 235; Haven v. White, 39 Ill. 509; Green v. Chapman, 27 Vt. 236; Engliss v. Furness, 4 E. D. Smith (N. Y), 587; Rogers v. Rogers, 5 Ired. (N. C.) Eq. 31; Dewey v. Metcalf, 28 Me. 389; Portland Bank v. Hyde, 27 Vt. 236. But under the statute of Pennsylvania, it seems that an action may be maintained in such cases. Heburn v. Curts, 7 Watts (Penn.), 300; McFadden v. Hunt, 5 Watts & S. (Penn.) 468; Tassy v. Church, id. 468; Wentworth v. Raiguel, 9 Phil. (Penn.) 275. The general rule, however, is, that one partner cannot sue the firm of which he is a member, and for the same reason that he cannot be sued by it, except in an action to account or for the balance of an account struck. Dewitt v. Staniford, 1 Root (Conn.), 270; Lamolere v. Gaze, 1 Wash. (U. S. C. C.) 435; Kennedy v. McFaddon, 2 Har. & J. (Md.) 194; Young v. Brick, 3 N. J. L. 663; Murray v. Bogart, 14 Johns. (N. Y.) 318; Springer v. Cabel, 10 Mo. 640: McKnight v. McCutchen, 27 id. 436; Smith v. Smith, 33 id. 557; Lower v. Denton, 9 Wis. 268; Ives v. Miller, 19 Barb. (N. Y.) 196; Gridley v. Dale, 4 N. Y. 486; Chase v. Garvin, 19 Me. 211; Barley v. Harris, 8 N. H. 233; Estes v. Whipple, 12 Vt. 373; Stalhert v. Knox, 5 Mo. 112; Myrick v. Dame, 9 Cush. (Mass.) 248; White v. Harlow, 9 Gray (Mass.), 463; Lindell v. Lee, 34 Mo. 103; Powell v. Maguire, 43 Cal. 11, where it was held that an agreement for a partnership which was not consummated, but one of the parties entered upon the enterprise alone, did not entitle the other party to an accounting, but his remedy was at law for a breach of contract; McKenzie v. Dickenson, 43 Cal. 119, where it was held that a partner might purchase with his own funds and outside of the partnership business, a judgment or other

Yates, it appears that such an action is not maintainable; but possibly, under the same circumstances, it would now be held that the action might be maintained by B alone.[1]

Persons engaged in an illegal partnership cannot maintain an action on any contract arising out of their dealings as partners. The illegality of the partnership ought to be pleaded specially,[2] but if it appear from the plaintiffs' own case at the trial, it will, it is apprehended, be ground of nonsuit. Where the partnership is legal, the partners cannot recover upon an illegal contract, although such contract, at the time it was made, was known only to one of the members of the firm.[3]

Persons who may legally be partners in foreign countries, as, for instance, husband and wife, are not permitted to sue as partners in this country. If they have recourse to an English tribunal, they must place such a plaintiff before that tribunal as can by the laws of this country be permitted to sue.[4] So, conversely, partners trading abroad in such mode as to constitute a partnership here, may sue here as partners for consignments sent to this country, though they cannot sue as partners at the place of trading, by reason of the particular law at that place.[5] For, in the words of Heath, J., "In construing contracts, we must be governed by the laws of the country in which they are made; for all contracts have a reference to such laws. But when we come to remedies, it is another thing; they must be pursued by the means which the law points out where the party resides. The laws of the country where the contract was made can only have a reference to the nature of the contract, not to the mode of enforcing it."[6]

---

[1] See Evans v. Silverlock, 1 Peake, 31.

[2] Reg. Gen. H. T. 1834, Morse v. Wilson, 4 T. R. 353.

[3] Biggs v. Lawrence, 3 T. R. 454. But we have noticed that a member of a partnership may require the other members to account, even though the business may have been illegal.

[4] Cosio v. De Bernales, Ryan & Moody 102.

[5] Shaw v. Harvey, 1 Mood. & Malk. 526; see Dutch West India Company v. Van Moses, 1 Str. 612.

[6] Melan v. Duc de Fitz-James, 1 Bos. & Pull. 138. The opinion of Mr. Justice Heath has been adopted in the recent cases of The British Linen Company v. Drummond, 10 Barn. & Cres. 903, and De la Vega v. Vianna, 1 Barn. & Adolph. 284; Ex parte Chevalier, 1 Mont. & A. 345, and Trimbey v. Vignier, 1 Bing. N. C. 151. In De la Vega v. Vianna, it was decided that one foreigner may arrest another in England for a debt which accrued in the foreign country while both resided there, though the law of that country does not allow arrest for debt. The opinions, likewise of Huber and Voet, which are cited in the last-mentioned case, support the general doctrine that this remedy should be pursued according to the law of the country where the debtor resides. The latter author, however, observes that in some places, upon the arrest of one foreigner by another, it was the practice to remit them to their own courts, if both parties were of the same domicile, and the defendant asked such relief. By the law of France, a foreigner may be

Lastly, the rights of partners to sue in respect of partnership transactions are affected by the bankruptcy of one or more of them. For, in that case, they cannot generally maintain an action *ex contractu*, without joining the assignees of the bankrupt as plaintiffs.[1] Likewise, if one partner in an adventure buy goods for the adventure and become a bankrupt, and his vendor, without notice of the partnership, stop the goods *in transitu*, the solvent partner is then tenant in common of the goods with the vendor, and cannot sue the latter for them in an action of trover.[2]

Having made these general observations on the rights of partners to sue in an action, let us proceed to examine the several most material points connected with the action itself.

Of the parties to an action ex contractu.

SEC. 677. In an action against a stranger to enforce a contract made with the firm where there has not been any severance of interest, all who were partners at the time of the contract must join as plaintiffs.[3] The reason given is that where the interest is joint, if several were to bring actions for one and the same cause, the court would be in doubt for which of them to give judgment.[4] Hence,

sued in the French courts by a Frenchman; or, *vice versa*, a Frenchman may be sued there by a foreigner, in respect of contracts arising in a foreign country. See Code Civil, arts. 14, 15. But, except in commercial or criminal matters, it should seem that one foreigner cannot effectually sue another in the French courts, unless by consent of the defendant. And even then, in the words of M. Rogron, "*Si ces deux étrangers consentent à être jugés par les tribunaux francais, ceux-ci prononcent plutôt comme arbitres que comme juges; car ils n'ont pas une veritable jurisdiction sur ces étrangers.*" Code Civil, *par* Rogron, 14. It may be remarked that the opinion of Lord Loughborough, in Talleyrand v. Boulanger, 3 Ves. 447, which seems to coincide with the law of France as just stated, is completely overruled by the case of De la Vega v. Vianna, cited above. See further on this subject, Story's Conflict of Laws, p. 800; Ex parte Pollard, 3 Mont. & A. 340.

[1] See the next Section.

[2] Salomons v. Nissen, 2 T. R. 674.

[3] Mont. Partn. 59; Lambert's case, Godbolt, 244; Cabell v. Vaughan, 1 Saund. 291 b, n. 4.

[4] Per Lord Kenyon, Anderson v. Martindale, 1 East, 497. Where moneys are paid out of a *joint fund*, the joint owners of the fund should sue jointly for the money paid. In Osborne v. Harper, 5 East, 225, the two plaintiffs and the defendant had been partners; and, after the dissolution of the partnership, the defendant drew a bill in their joint names. The other parties to the bill were ignorant of the dissolution. The holder brought an action against the three *quondam* partners. Harper pleaded his bankruptcy, and a *nolle prosequi* was entered as to him, but against the two plaintiffs a verdict passed for 1,156*l*. The two plaintiffs were never partners after the dissolution before mentioned, but their attorney proved that he had discharged the whole demand, 1,156*l*., at the request of both plaintiffs. On an affidavit being produced (by direction of the court) that the attorney advanced the money on the joint credit of both the plaintiffs, the court held that it was a joint fund from which the payment was made, and a joint action was therefore maintainable. And, conversely, a promise to pay by *partners* is a promise to pay out of a joint fund, although they agree to

when the contract is under seal, all the partners covenantees must join; and as their legal interest is joint, it matters not though the covenant be in terms joint and several.[1] Hence, also, when the contract

pay equally out of their own private cash; and they must be sued jointly upon such promise. Byers v. Dovey, 1 H. Bl. 236. So, where moneys when recovered will be the joint property of the parties who bring the action, they are rightly joined as plaintiffs, whether they are partners or not. Bond v. Pittard, 3 Mees. & W. 357. But in respect of a separate fund, a separate action must be brought. Thus, in Brand v. Boulcott, 3 B & P. 235, the plaintiffs and defendant had been joint assignees under a bankruptcy. The solicitor's bill was 208*l.*; each of the plaintiffs paid him 104*l.*, and brought a joint action against the defendant, the other assignee, for his share. But Lord Alvanley nonsuited the plaintiffs, on the ground that each should have brought a separate action; and on motion for a new trial, the Court of Common Pleas were of the same opinion. However, in a case in which the plaintiffs brought their action to recover a sum of money paid by the plaintiffs as bail in error for the defendants, to make up which sum each of the plaintiffs had advanced his share, Burrough, J., ruled that, as the payment was made *in one sum* and as a *joint payment*, a joint action was maintainable. May v. May, 1 Car. & Payne, 14.

"*On specialties.*—As regards contracts under seal, it is settled that, if such a contract is entered into with one partner only, he alone can sue upon it, and that, if it is entered into with more than one partner, all those with whom it is expressly entered must sue upon it and no others can, whatever their interest in its performance may be. See the note to Cabell v. Vaughn, 1 Saund. 291, i; Scott v. Godwin, 1 Bos. & P. 67, Vernon v. Jeffreys, 2 Str. 1146. If a creditor's deed is made (as such deeds usually are) between the debtor of the one part, a trustee of the second part, and the several other persons whose hands and seals are set and subscribed thereto (being creditors of the debtor) of the third part, and one partner on behalf of himself and copartners, being creditors, signs the deed in the name of the firm and seals the deed, that one partner alone can sue for non-payment of the sum covenanted to be paid in respect of the debt due to the firm. Metcalf v. Rycroft, 6 M. & S. 75. When several persons are covenanted with jointly, and it appears from the deed containing the covenant that the covenant, though joint in form, is made with them in respect of several interests, in that case the covenant is construed as entered into with each covenantee severally, and each must therefore sue alone for a breach by which he is damnified. See the note to Eccleston v. Clipsham, 1 Wms. Saund. 155, a. This rule, however, can seldom, if ever, be applicable to a covenant entered into with several partners in respect of any partnership matter, for their interest therein is almost necessarily joint. It is apprehended that a covenant entered into with A, B & Co., might be sued upon by the persons who, when the covenant was made, constituted that firm, but the writer is not aware of any decision precisely to that effect.

On bills and notes.—As regards bills of exchange and promissory notes. If they have been indorsed in blank, any person holding them may sue upon them and no objection can be taken on the ground of misjoinder or non-joinder of parties as plaintiffs. See Ord v. Portal, 3 Camp. 239; Attwood v. Rattenbury, 6 Moore, 579; Lowe v. Copestake, 3 Car. & P. 300. In Law v. Parnell, 6 Jur. (N. S.) 172, it was held that the manager of a banking company could sue in his own name on a bill indorsed in blank and given to the company. Special circumstances may, however, exist, showing that the bill or note was given to certain persons for some definite purpose, and if that is the case they cannot, it is said, sue upon it jointly with any other

[1] Anderson v. Martindale, 4 East, 497; and see Eccleston v. Clipsham, Saund. 153; 1 Chit. Pl. 6, n. *d.* It is a well-settled principle that covenants shall not be construed to be joint or several from the particular language in which they may be conceived, but shall be measured and moulded according to the interest of the covenantees; and although in terms the covenant may import to be joint, yet, where the interest is several, so shall the covenant be construed. Platt on Covenants, 123.

is in the form of a negotiable security, all the partners payees must join; and where, by the terms of the contract, a note given to the firm is to be a continuing security throughout all the changes of the house, if the

person. Thus in Machell v. Kinnear, 1 Stark, 499, a bill indorsed in blank was given to a firm of bankers on account of the estate of an insolvent, and it was held that the trustees of that estate, who were not members of the firm, could not, together with the members thereof, join in suing the indorser without showing that the bill had, by delivery or otherwise, been transferred to all the plaintiffs. This decision is the more remarkable as the bankers themselves were among the trustees of the estate in question. When a bill or note is not indorsed in blank, the persons, and the only persons to sue upon it are those named in the instrument as drawers, payees, or indorsees, as the case may be. See Pease v. Hirst, 10 B. & C. 122. Whether they are partners or not is of no consequence, and, therefore, if a bill is drawn in the name of two persons as if they were partners, they must both join in an action on the bill, although one of them has no interest in it. Guidon v. Robson, 2 Camp. 302. So, it is immaterial whether the bill or note relates to partnership matters or not, for if a debtor to a firm makes his promissory note payable to one of the partners only, such one is the proper person to sue on the note. Bawden v. Howell, 3 Man. & Gr. 638. If a bill is drawn by, or in favor of a firm in its commercial name, A, B & Co., and it is necessary for the firm to sue on such bill, all the persons who composed the firm when the bill was drawn, ought to be plaintiffs. M'Birney v. Harran, 5 Ir. Law. Rep. 428; Phelps v. Lyle, 10 A. & E. 113. If one partner in his own name accepts a bill drawn on a stranger for his Honor, and pays the bill when due out of the funds of the partnership with the consent of his copartners, the partner who accepted the bill is the proper person to sue the drawee for indemnity. Driver v. Burton, 17 Q. B. 989.

On contracts generally.—With respect to other simple contracts, whether written or verbal, it is a rule that where a contract is entered into with several persons jointly, they must all join in an action upon it. 1 Wms. Saund. 291 k, and 1 Chitty on Plead. 10-15. Formerly mistakes in this respect were fatal, but now amendments are allowed. Williams v. Groves, 1 Fos. & Fin. 341. But the rule which, in the case of deeds, precludes the joinder of any person with whom the contract is not expressly made, has here no application, for it has long been settled that if a simple contract, written or verbal, expressed or implied, has been entered into with an agent, it may be sued upon by his principal, and this rule holds even in the case of an undisclosed principal if he can show that in point of fact the agent contracted on his behalf. See Phelps v. Prothero, 16 C. B. 370; Sims v. Bond, 5 B. & Ad. 389; compare Ramazotti v. Bowring, 6 Jur. (N. S.) 172. This doctrine is constantly applied in partnership cases; it happens every day that a firm sues on a contract entered into on its behalf by one of its members, and it is not by any means necessary that the person dealing with him should have been aware that the one partner was acting on behalf of himself and other people. The question is, with whom was the contract made in point of law? And the true answer to this question does not by any means entirely depend on the answer to be given to the more simple question, with whom was the contract made in point of fact? Thus in Garrett v. Handley, 4 B. & C. 664 (see the same case, 3 B. & C. 462), where an action by the one partner failed. See Hopkinson v. Smith, 1 Bing. 13, as to actions by attorneys not retained by the defendant. All the members of a firm were held entitled to sue on a written guaranty given to one of the partners only, there being evidence to show that the guaranty was intended for the benefit of the firm. So, where a member of a firm of bankers was asked for a loan, and he made it out of the funds of the bank, it was held that an action for the recovery of the money lent was properly brought by all the members of the firm, although the borrower had not requested any loan from the bank. Alexander v. Barker, 2 Cr. & J. 133; Garrett v. Handley, 3 B. & C. 462. See Sims v. Britain, 4 B. & A. 375; and Sims v. Bond, 5 id. 389. So, where one partner sells goods belonging to the firm, Skinner v. Stocks, 4 B. & A. 437, or does work, Townsend v. Neale, 2 Camp. 189; Arden v. Tucker, 4 B. & Ad. 817, of the kind he and his copartners undertake, an action for payment may be maintained by him and them

note be not indorsed to any of the successive new firms, the original payees must join as plaintiffs, although some may have retired from the partnership.[1]

jointly, although the person to whom the goods were sold or for whom the work was done, knew nothing of the other partners. In the recent case of Cooke v. Seeley, 2 Ex. 746, a partner had an account at a bank in his own name, but there was evidence to show that it was a partnership account, and was known to the bankers to be so, and under these circumstances it was held that all the partners were entitled to sue the bankers for dishonoring a check drawn on them by the one partner for partnership purposes. It follows from the principle on which these cases were decided, and although formerly doubted (see Mawman v. Gillett 2 Taunt. 325; Lloyd v. Archbowle, id. 324), it is now clearly established, that dormant partners may join as plaintiffs in an action on a contract entered into on behalf of the firm of which they are members. This was expressly stated in Cothay v. Fennel, 10 B. & C. 671, where a person who had agreed to sell goods to A was held to be liable to be sued for a breach of his contract by A and others, who were to be jointly interested in the goods with him. The court said that the other plaintiffs might be treated as dormant partners in the transaction, and that a dormant partner in one instance might sue, as well as a dormant partner in the general business of a mercantile house. In this case it does not appear that the contract was in writing or had any thing special in it, but even if it had been in writing, and had been of a special nature, the same principle would have applied. See Robson v. Drummond, 2 B. & Ad. 303, per Littledale, J. The authorities which have been just referred to established the rule, that when an ordinary contract not under seal is entered into with an individual partner, such contract, whether written or verbal, express or implied, may be sued upon at law by him and his copartners if they can show that the contract was really entered into by the individual partner on behalf of the firm. But it does not necessarily follow that, because all the partners may sue on such a contract, they must do so. Whether they must or not depends upon the nature of the contract and upon whether the firm was in a position of a disclosed or an undisclosed principal. The rules on this subject are as follows:

Dormant partners need not be joined.—A dormant partner never need be joined as a co-plaintiff in an action on a contract entered into with the firm or with one of its members. Leveck v. Shafto, 2 Esp. 468, action for work and labor. See Phelps v. Lyle, 10 A. & E. 113, as to contracts with the "directors" of a company.

All must join.—If a contract is expressly entered into with a firm or with one of its members on its behalf, such contract must be sued upon by all the members composing the firm at the time the contract is entered into, see 1 Wms. Saund. 291 k, and 1 Chitty on Pleading, 10-15; Phelps v. Lyle, 10 A. & E. 113; Metcalf v. Bruin, 12 East, 400; Woolmer v. Toby, 4 Ra. Ca. 713, excepting only the then dormant partners, if any.

On implied contracts.—All the members of a firm (except the dormant partners) must join as plaintiffs in an action on an implied contract with the firm, whether the person sued supposed he was dealing with the firm or not. Thus, if the funds of the firm are lent by one partner, he cannot alone maintain an action for its repayment by virtue of any implied contract with himself, for the promise to repay, which is implied by law, is a promise with the real lenders of the money and must be sued upon by them. See Garrett v. Handley, 3 B. & C. 462; Graham v. Robertson, 2 T. R. 282; Teed v. Elworthy, 14 East, 210.

On written contracts.—Where a written contract is entered into with one partner and it does not appear on the face of the contract that he was acting on behalf of the firm, he *may* sue alone on that contract. In such cases the action may be maintained *either* in the name of the person with whom alone the contract was ostensibly made *or* in the name of the parties really interested. See Skinner v. Stocks, 4 B. & Ald. 437, and Cothay v. Fennell, 10 B. & C. 671.

[1] Pease v. Hirst, 10 Barn. & Cres. 122; Twopenny v. Young, 3 Barn. & Cres. 208; 5 Dowl. & Ryl. 259.

Must be partners at the time of the contract.

SEC. 678. But, generally, in all contracts, *by parol or otherwise, they only who were partners at the time of the contract must join;* and, therefore, *a person who enters the partnership after* the completion of

Nominal partners.—The expression, "members of the firm," as used in the preceding observations, is not intended to include what are called *nominal* partners, *i. e.*, persons who are not entitled to share the profits of the firm, but whose names appear and are used as if they were. Such persons never need join as plaintiffs in an action on a contract not expressly made with them. In Kell v. Nainby, 10 B. & C. 20, the plaintiff practiced as an attorney and solicitor under the name of Kell & Son, and he sued in his own name for business done by him for the defendant. It was objected that the son ought to have been a co-plaintiff, but it was proved that the son was only a salaried clerk and had not been employed by the defendant, and it was therefore held that the action was properly brought by the father alone. There are several other cases to the same effect, Barker v. Stubbs, 1 Man. & Gr. 44; Davenport v. Rackstraw, 1 C. & P. 89; Parsons v. Crosby, 5 Esp. 199; Harrison v. Fitzhenry, 3 id. 238; Glossop v. Colman, 1 Stark. 25, and they show that if a partner retires and leaves his name in the firm it is not necessary that he should be a co-plaintiff in an action brought by the continuing partners in respect of what has happened since the retirement. Cox v. Hubbard, 4 C. B. 317. But, *prima facie*, a nominal partner shares profits, and therefore ought *prima facie* to be joined as a co-plaintiff in an action on an express or implied contract with the firm. This is shown by Teed v. Elworthy, 14 East, 210. There the plaintiff, whose name was John Teed, carried on the business of a banker under the name of John and Thomas Teed & Co. He had a son of the name of Thomas, who it was sworn had no concern in the bank, but who, for any thing else that appeared in evidence, might have had some interest in its capital or profits. A customer of the bank, having overdrawn his account, was sued by John Teed alone, but it was held that the evidence was not sufficient to show that Thomas was a merely nominal partner and that he therefore ought to have joined in the action. If a nominal partner is a party to the contract sued upon, he must be a party to the action brought upon it. Thus, in Guidon v. Robson, 2 Camp. 302, the plaintiff carried on business under the name of Guidon & Hughes, and in that name he drew a bill on the defendant, who accepted it, but failed to pay it when due. Hughes was a salaried clerk employed by the plaintiff in his business, but he was not a partner, and had no share in the profits. It was nevertheless held that, as his name was on the bill, he ought to have joined in the action.

The above cases are sufficient to show under what circumstances a nominal partner must join as a co-plaintiff with the real partners, and under what circumstances he need not do so. But there yet remains this further question, whether he may join in those cases in which it has been established that he need not. Mr. Collyer is of opinion that he may, and he rests his opinion on Bond v. Pittard, 3 M. & W. 357.

But this case, when examined, is not an authority in point, for the so-called nominal partner had a share in the profits, and the decision of the court turned on that circumtance and on the necessary consequence that both partners were interested in the fund sought to be recovered. Upon principle the writer ventures to submit that, in all cases where a nominal partner need not join he ought not to do so, for, *ex hypothesi*, he is no party to the contract sought to be enforced, and he has no interest in its subject-matter.

When one may sue alone.—It appears from the foregoing statements that under certain circumstances an action may be brought upon a contract entered into on behalf of a firm, *either* by all the partners *or* by the individual partner with whom the contract was made, and that, under certain other circumstances, an action upon such a contract ought to be brought by all the partners jointly. But there are also circumstances under which an action ought not to be brought by all the partners, and these remain to be considered.

When one should sue alone.—One partner ought always to sue alone upon an ordinary contract entered into with himself if such contract is to be regarded

the contract, cannot be made a plaintiff unless the debtor admit him as a creditor, and it be agreed between the parties that the contract with the old firm shall be extinguished, and a contract with the new

as made with him as a principal, and not on behalf of himself and others. Therefore, if each of several partners lends money out of his own funds, each must sue alone for repayment of his advance, although the loans may have been made in pursuance of some arrangement with all the partners, for in the case supposed each loan creates a separate debt to each partner, and they do not altogether form one debt to the firm. See Thacker v. Shepherd, 2 Chitty, 652; Brand v. Boulcott, 3 Bos. & P. 235. Again, if one partner alone holds a certain office and does work in his official capacity, he alone ought to sue for payment of the work so done. Brandon v. Hubbard, 2 Brod. & Bing. 11.

As a partner who, on behalf of himself and copartners, enters into a contract under seal, is alone liable to be sued on such contract he is for all the purposes of that contract, and as between himself and the other parties to it, in the position of a principal and not of an agent. If, therefore, the contract is for the payment of money by him and the money is paid out of the funds of the firm, and it then appears that the contract was invalid on the ground of fraud, the partner who sealed the contract is the proper person to sue for the recovery back of the money.

This was held in Lefevre v. Boyle, 3 B. & Ad. 877. There a policy of insurance had been granted by three trustees of an insurance society, and had been paid out of the funds of the society. An action was afterward brought by the three trustees alone to recover back the money paid, on the ground that the policy had been granted on the faith of false and fraudulent representations, and it was held that the three trustees were the proper parties to sue. The last class of cases in which it is proper for one partner to sue alone in respect of a contract not under seal, entered into by him and relating to the partnership business, is where he has represented that he is acting on his own private account and not for the firm to which he belongs. A leading case on this head is Lucas v. De la Cour, 1 M. & S. 248, in which all the members of a firm brought an action for the loss of some goods belonging to the firm and intrusted to the defendant. It appeared, however, that one of the partners only had been in communication with the defendant, and that such partner had represented the goods to be his own exclusively. On this evidence the plaintiffs were nonsuited, and the court declined to set the nonsuit aside, observing that if one partner makes a contract in his individual capacity, and the other partners are willing to take the benefit of it, they must be content to do so according to the mode in which the contract was made.

Actions ex delicto. — With respect to actions by partners not founded on any breach of contract or of *quasi* contract but on some tort, the general principle is that, where a joint damage accrues to several person from a tort, they ought all to join in an action founded upon it, See 1 Wms. Saund. 291, n; Addison v. Overend, 6 T. R. 766; Sedgworth v. Overend, 7 id. 279; whilst, on the other hand, several persons ought not to join in an action *ex delicto*, unless they can show a joint damage. 2 Wms. Saund. 116 a. These doctrines are well illustrated by actions for libel. A libel can clearly be made the subject of an action in the name of all the partners, if the firm has been damnified. See Cooke v. Batchelor, 3 Bos. & P. 150; Forster v. Lawson, 3 Bing. 452; Williams v. Beaumont, 10 id. 260; The Metropolitan Saloon Omnibus Co. v. Hawkins, 4 H. & N. 87, and if the libel reflects directly on one partner, and through him on the firm, two actions will lie, viz., one by the partner libeled and the other by him and his copartners, but the damage in the first action must not appear to be joint, nor must that in the second appear to be confined to the libeled partner only. See Harris v. Bevington, 8 C. & P. 708; and Forster v. Lawson, 3 Bing. 452; 2 Wms. Saund. 117 b; Haythorne v. Lawson, 3 C. & P. 196. If one partner is libeled and the firm cannot be shown to have been damnified, an action for the libel should be brought in the name of the individual partner aggrieved, and not by the firm, Solomon v. Medex, 1 Stark. 191, and it has been settled that he may sue alone, although the libel more particularly affects him in the way of his business. Harris v. Bevington, 8 C. & P. 708; Robinson v. Marchant, 7 Q. B. 918.

firm substituted.[1] But, under the latter supposition, the incoming partner may join as plaintiff. Thus, where A was indebted to B, and C became a partner with B, and A contracted a further debt with both, and then settled an account with both, as well upon what was due to B before his partnership with C, as upon the debt contracted afterward, it was held that B and C might join in an action against A on an account stated.[2]

Where partners have entered into contracts in writing, whether under seal or otherwise, generally they alone who are included in such contracts are entitled to sue upon them. The rule, however, is

---

It may be observed that a firm may sustain an action for a libel affecting it, without proving the existence of what is commonly called malice on the part of the defendant. Bromage v. Prosser, 4 B. & C. 247. A person, who utters what is untrue of his neighbors and causes them damage, is answerable for such damage, whether he bore them any ill-will or not, unless he can show that what he uttered ought to be regarded as a privileged communication, and in estimating the damages to which they are entitled, regard may be had to the prospective loss. See Gregory v. Williams, 1 Car. & Kir. 568. Moreover, a general statement not clearly pointing to any particular person, but libelous as to an entire class, may be treated by any individual of that class, who can show that he was in fact intended, as a libel on himself, and this principle is as applicable to libels affecting a firm as to those affecting single individuals. Le Fanu v. Malcomson, 1 Ho. Lo. Ca. 637. All the members of a firm ought to join in an action for the recovery of goods of the firm, or for damages for their loss or injury. See Addison v. Overend, 6 T. R. 766; Bleadon v. Hancock, 4 Car. & P. 152: see Dockway v. Dickenson, Comb. 366, but if one only sues and there is no plea in abatement, he will be entitled to recover damages in respect of his interest in the goods. See Addison v. Overend, 6 T. R. 766; Bleadon v. Haucock, 4 Car. & P. 152; see Dockway v. Dickenson, Comb. 366, and if, after he has done so, another action is brought by one of his copartners, that action cannot be stopped on the ground that all the partners are not co-plaintiffs, for the defendant should have pleaded this in abatement to the first action. Sedgworth v. Overend, 7 T. R. 279. If a person colludes with one partner in a firm to injure the other partners, the latter can jointly sustain an action against such person. Thus, where the bankers of a firm of four partners knew that one of them was in the habit of drawing bills in the name of the firm for his own private purposes and the bankers colluded with him and kept his copartners in ignorance of what was going forward, and paid the bills when due out of the funds standing to the credit of the firm, it was held that an action lay against the bankers at the suit of the other three partners. Longman v. Pole, Moo. & Mal. 223. An action of ejectment for the recovery of real property belonging to the firm ought to be brought in the names of all those persons in whom the legal estate is vested. See 1 Chitty on Plead. 74. If, however, one partner only has made a lease of the partnership property, then, as his title cannot be disputed by the lessee, notice to quit may be given and ejectment maintained by the lessor alone, and if he alone has the legal estate, the circumstances, that rent has been paid to the firm and receipts for it have been given by all the partners will not affect his right to give the notice and bring the action in his own name. See Doe v. Baker, 2 B. Moore, 189." Lindley on Partnership, pp. 385, 395.

---

[1] Welsford v. Wood, 1 Esp. 182.

[2] Moor v. Hill, 2 Peake, 11. Under what circumstances a debt is assignable at law appears from Tatlock v. Harris, 3 T. R. 180; Wilson v. Coupland, 5 Barn. & Ald. 228; Fairlie v. Denton, 8 Barn. & Cres. 395, and the cases cited in the last-mentioned case. See, also, Com. Dig., Action on the case upon *Assumpsit* (B. 3).

confined within stricter limits in the case of deeds than in that of instruments not under seal.

Thus, in an action by partners on a deed, those members alone can be made plaintiffs who are parties to the deed, although the deed may have been executed for the benefit of the whole firm.[1] By an indenture made by A of one part, and the several other persons whose hands and seals were set and subscribed, being creditors of A, of the other part, A covenanted with the said several creditors parties thereto, their and each and every of their respective partners, etc., that he would pay to the said several creditors, or their respective partners, etc., certain sums in discharge of their several debts, by way of installment. B, of the firm of B & C, who were creditors of A, subscribed the indenture in the name and firm of himself and partner, and set his seal thereto. Default having been made in payment of the installments, B *alone* brought his action on the covenant against A, and the declaration was held good on demurrer. "The defendant," observed Lord Ellenborough, "is an executing party, and he covenants to pay to the several parties or their partners, and he has not done so. No other than one who is a party to the deed can have a right to sue upon it; the right of suit is constituted by the deed; and here the other party is not a party to it."

In the case just cited it appeared by the terms of the deed that those creditors alone were parties "whose hands and seals were set and subscribed thereto;" therefore, a person not signing and sealing was not a party, and could not have joined in the action. But, generally, where a person is named as a party to a covenant, and assents to it, he may afterward join in an action on the covenant, although he did not seal.[2]

In cases of this nature, where the partners resort to a higher security for their debt than that of *assumpsit*, they must abide by such security,[4] and, therefore, when only part of a firm are parties to the

[1] Ex parte Peele, 6 Ves. 604; Ex parte Williams, Buck, 13; Harrison v. Fitzhenry, 3 Esp. 238. See Berkeley v. Hardy, 5 Barn. & Cres. 355; 8 Dowl. & Ryl. 102.

[2] Metcalf v. Rycroft, 6 Mau. & Sel. 75. See D. Littledale, J., 10 Barn. & Cres. 127.

[3] Vernon v. Jeffries, Str. 1146; Clement v. Henley, 2 Roll. Abr. Fait, (F), pl. 2.

[4] Chit. Pl. *Assumpsit*. The general rule seems to be that where the contract, which is the foundation of the action, is contained in a deed, the deed must be declared upon, although, without the existence of any deed, the facts of the case would have supported a general action of debt or *indebitatus assumpsit*. Evans v. Bennet, 1 Camp. 303, note. See Atty v. Parish, 1 N. R. 104. There is no case where, the interest being *the same* as that secured by the deed, it has been holden that *assumpsit* will lie. Per Lord Ellenborough, Schack v. Antony, 1 M. & S. 574. See Lefevre v. Boyle, 3 B. & Ad. 877.

higher security, the entire firm cannot be made plaintiffs in any action for the recovery of the debt. It may be observed, however, that all joint covenantees or obligees who *may* sue, must sue.[1] But a declaration by those parties only who sealed would probably hold good, if it averred and the facts were that the others who had not sealed had also refused their assent.[2]

Distinction between sealed and unsealed contracts as to parties.

SEC. 679. But although contracts contained in a deed can only be enforced by those who are parties to the deed, yet written contracts, not under seal, may be enforced at law by those for whose benefit they are made, as well as those whose names appear upon the face of the contract. In the words of Mr. Justice Bayley, it has frequently been decided, that if a party enters into a contract in his own name for the benefit of others, either he may be sued because he entered into the contract, or those persons for whom he entered into it may be sued; and, *e converso*, the agent may sue, or the parties for whose benefit the contract is effected may sue.[3] Therefore, an action may be maintained by all the partners on a guaranty given in terms to one only, if given for the benefit of all,[4] or it may be maintained by that partner alone to whom it is given.[5]

On these principles, likewise, an action on a policy of insurance may be brought by either the person in whose name, or the person on whose account, the policy was effected.[6] And though the person whose name is used in the policy be inserted jointly with another, the action may be brought in his name separately, if the joint interest be stated in the declaration.[7] Likewise, where a policy is effected in the names of A and B, but A only is interested, the action may be brought in his name separately, his separate interest being stated in the declaration.[8]

Parties to actions on bills and notes.

SEC. 680. These principles, however, are not to be extended to bills of exchange and promissory notes, as the proper persons to sue on such securities are they whose names appear thereon as payees, or special indorsees. In a late case, a person gave his promissory note to

[1] Scott v. Godwin, 1 Bos. & Pull. 67.
[2] Petrie v. Bury, 3 Barn. & Cres. 354; 5 Dowl. & Ryl. 152.
[3] Hall v. Smith, 2 Dow. & Ryl. 527; Marchington v. Vernon, 1 Bos. & Pul. 101.
[4] Garrett v. Handley, *ante*, p. 447; Alexander v. Barker, Id.
[5] 4 Barn. & Cres. 666; but see *contra*, per Coleridge, J., 2 P. & D. 251.
[6] Grove v. Dubois, 1 T. R. 112; Cumming v. Forrester, 1 Mau. & Sel. 497; Hagedorn v. Oliverson, 2 M. & S. 426. D. Bayley, J., 4 Barn. & Cres. 666.
[7] Cosack v. Wells, 1 Chit. Pl. 5.
[8] Marsh v. Robinson, 4 Esp. 98.

the partners of a banking-house. These partners retired from the house, and various changes took place in the members of the firm. Upon every change the note was handed over to the new firm, and it was evidently intended to be a continuing security. Upon none of these occasions, however, was the note indorsed to the new firm. After the retirement of the original payees an action was brought on the note in their names, without joining the new partners. It was contended that such action was improperly brought; that the note was considered by all parties to be for the benefit of the new house; and, therefore, that the persons who were partners at the time of bringing the action ought to sue. But Bayley, J., said that it seemed to him that the action had been rightly brought in the names of the members of the firm to whom the note was given. If the note had been indorsed to the new firm, then the action must have been brought in the names of the indorsees; but not having been so indorsed, the action was properly brought in the names of the original payees for the benefit of the parties interested. And Littledale, J., observerd that, although all the securities belonging to the old firm were handed over to the new firm, still the persons entitled to the legal interest in those securities must sue upon them.[1]

Where, however, a bill is indorsed to a firm in blank, all or any of the members may sue, as an indorsement in blank conveys a joint right of action to as many as sue on the bill, or a separate right of action to him who alone sues.[2]

In cases where some only of a firm are parties to a written instrument, and sue alone upon it without joining their copartners, the defendant is estopped from saying that there are other joint contractors who ought to have been plaintiffs.[3]

Right of action cannot be transferred, when.

SEC. 681. An agreement between the partners cannot vary their right of action against third persons. Hence, it has been observed that the ostensible members of a firm cannot, by agreement, give

[1] Pease v. Hirst, 10 Barn. & Cres. 122. See Ex parte Greening, 13 Ves. 206; M'Neillage v. Holloway, 1 Barn. & Ald. 218.

[2] Per Lord Ellenborough, Ord v. Portal, 3 Camp. 239; see Attwood v. Rattenbury, 6 Moore, 570. If several persons, not partners in business, separately indorse, for the accommodation of the drawer, a bill of exchange which has been previously indorsed by another person, and, on the bill being dishonored, pay the party who has discounted it in equal proportions, they may strike out their own indorsements, and bring a joint action against such previous indorser to recover the amount of the bill. Low v. Copestake, 3 Car. & Payne, 300.

[3] See Kieran v. Sanders, 6 Ad. & Ell. 515.

authority to any one of them to bring an action in his name against strangers.[1] So, it has been ruled, that if a firm admit a new member upon an agreement that he shall be deemed a partner from a previous day, an action for a debt contracted with the partnership before the day when the new member was actually admitted, must be instituted in the name of the old firm.[2] On the other hand, if persons hold themselves out as partners to the world, and a person contracts with them in that character, they have a right to bring a joint action against him; and he cannot defend the action on the ground that the plaintiffs are not partners *inter se*.[3]

Parties to action on a deed.

SEC. 682. In the case of a deed, when the legal interest and cause of action of the covenantees is several, each may sue separately for his particular damage, although the words of the covenant are joint only.[4] So, in the case of a simple contract, made with one of several partners acting for the firm, if the person who contracts should afterward treat the joint contract as several, each member of the firm will then be enabled to sue him severally. Thus, where three persons had employed the defendant to sell some timber for them, in which they were jointly concerned, and the defendant paid two of them their exact proportion, for which they respectively gave him their receipt, and the third brought his action for the remainder, being his share, it being objected that this was a joint employment by three, and that one alone could not bring his action, Lord Mansfield overruled the objection, and held that, there having been a severance, one alone might sue.[5] So, where the action was for the use and occupation of a house, and it appeared that the house was the property of six several tenants in common, to all of whom, except the plaintiff, the defendant had paid his rent, and this action was for his share of the whole rent, it was objected that one tenant in common alone could not bring this action, but that all ought to join; but Lord Mansfield overruled the objection, and the plaintiff recovered.[6]

Sometimes the joint action of partners is severed by dissolution. Where, on the dissolution of partnership between A and B, it is agreed that A shall receive some of the partnership debts, and B

[1] Radenhurst v. Bates, 3 Bing. 470; 11 Moore, 421. See Davies v. Hawkins, 3 Man. & Sel. 487; Puller v. Roe, 1 Peake, 260.
[2] Wilsford v. Wood, 1 Esp. 182.
[3] Bond v. Pittard, 3 Mees. & Wels. 857. But the real partners may sue alone.
[4] Chit. Pl. 6; 1 Saund. 153.
[5] Garret v. Taylor, 1 Esp. 117.
[6] Kirkman v. Newstead, 1 Esp. 117.

others, it has been ruled that each may maintain separate actions for the debts to be received by each respectively.[1] So, where a partnership between two persons in trade had been dissolved, and one of them carried on business afterward solely on his own account, but in the names of himself and former partner, it was held that he might maintain *assumpsit* alone for goods sold and delivered to the defendant during the existence of the partnership. But in this case Lord Tenterden observed that if the defendant had had a set-off or counterdemand, originating in transactions between himself and the partnership, then it would have been necessary to include the other partner as a plaintiff in the action.[2] So, in some cases where the partnership is dissolved by bankruptcy, the solvent partner may sue alone, without joining the assignees of the bankrupt.

A partner must sue severally, by reason of an *office* or *appointment* enjoyed by him, but which, being of a personal nature, is not shared by his copartner. Thus, for the more speedy delivery of cattle taken by way of distress, the statute 1 Philip & Mary, c. 12, provides that the sheriff shall make at least four deputies in each county, dwelling not above twelve miles from each other, for the sole purpose of making replevins. By the terms of this statute it seems clear that the office so constituted is of a personal nature. Therefore, it has been held that a replevin clerk, who is a partner in an attorney's firm, must sue alone for the expenses of preparing a replevin bond, although it be prepared at the office of the firm.[3]

Where attorneys, who are in partnership, are admitted of different courts, it seems to be unsettled whether they can maintain a joint action for business done in one court, though under a joint retainer. Yet it seems clear, except, perhaps, where the business has been transacted in Chancery, that such an action may be maintained.[4] And, at all events, any objection to such an action, arising from the stat. 2 Geo. 2, c. 23, must be the subject of a special plea, and cannot be made available under *non assumpsit*.[5]

In case of dormant partner.

SEC. 683. It is not necessary that a *dormant partner* should join with the ostensible partners of a firm, in an action against a person who

---

[1] Evans v. Silverlock, 1 Peake, 31.
[2] Atkinson v. Laing, 1 Dowl. & Ryl. N. P. C. 16.
[3] Brandon v. Hubbard, 4 Moore, 367; 2 Brod. & Bing. 11.
[4] Hill v. Sydney, 7 Ad. & Ell. 956; Arden v. Tucker, 4 B. & Ad. 817; Vincent v. Holt, 4 Taunt. 582.
[5] Hill v. Sydney, *ubi supra*.

dealt only with the ostensible partners.[1] And in one case, where an action was brought by M, a bookseller, against a printer, for not insuring a book of travels, and it appeared that several other booksellers had shares in the work, it was held that, as they had not contracted with the defendant, and M was the only ostensible man, he was the *only* proper plaintiff.[2] On the other hand, where one of several part-owners of a vessel contracted for the sale of some whale oil, it was held that all the part-owners might sue the purchaser, although at the time of the contract the purchaser did not know that other persons had any interest in the transaction. And it being objected that, under these circumstances, the defendant might be deprived of his right of set- off, the court said that the statutes of set-off did not prevent the action from being maintainable in the names of all the parties interested, though, if the defendant were injured by the loss of his right of set-off, he might perhaps apply to the court for relief.[3] And where money has been lent by a partner, under circumstances from which it may be inferred that it was lent by the firm, which inference, it is conceived, will arise if all the partners but the lender are dormant, all the partners may sue.

Upon the whole, where there are ostensible and dormant partners engaged in general trade, it seems to be optional whether the dormant partners shall or shall not join.[4] In one case Lord Tenterden

[1] Leveck v. Shaftoe, 1 Esp. 468; Lloyd v. Archbowle, 2 Taunt. 324.

[2] Mawman v. Gillett, cited in Lloyd v. Archbowle, 2 Taunt. 324.

[3] Skinner v. Stocks, 4 B. & A. 437; and see Rodwell v. Redge, 1 Car. & Payne, 220; Cothay v. Fennell, 10 Barn. & Cres. 671.

[4] *Dormant partners.*—On the subject of the liability of dormant partners, Mr. Lindley states the common law as follows: "It has been seen that they are liable on all contracts entered into on behalf of the firm to which they belong, and whether such a contract is written or unwritten, express or implied, it is clear that a dormant partner *may* be sued upon it. Robinson v. Wilkinson, 8 Price, 538; Beckham v. Drake, 9 M. & W. 79, overruling Beckham v. Knight, 4 Bingh. N. C. 234. Of course if a person is sued on the ground that he is a dormant partner, that fact must be proved, for otherwise no case will be made against him. See Hall v. Bainbridge, 8 Dowl. 583. By the general rule, therefore, which requires that all liable to be sued shall be sued, dormant partners ought always to be made co-defendants in an action on a contract binding the firm. And this is the law, subject, however, to the qualification that a person who holds himself out to another as the only person with whom that other is dealing, cannot be allowed afterward to say that such other was also dealing with somebody else. The leading cases on this subject are, Dubois v. Ludert, De Mautort v. Saunders, and Bonfield v. Smith. In Dubois v. Ludert, 5 Taunt. 609, Ludert was employed by one Schroeder to sell goods on commission, and was sued by his assignees for the proceeds of the sale of the goods. Schroeder had become indebted to one Groning in respect of some other business, and Ludert and Groning were partners, each being a dormant partner as regarded the business carried on by the other. Ludert, in order to set off in the action brought against him the debt due from Schroeder to Groning and Ludert, pleaded in abatement the non-joinder of Groning as a co-defendant. The plea

treated the point as doubtful. A contract had been entered into for five years by A, who had a dormant partner B. After A's retirement B became the ostensible trader, and carried on the business by himself. He then brought an action for a breach of the contract which

was allowed, the court expressing their opinion to be that if a man enters into a contract with one person not knowing that he has a partner, and makes his contract with that person alone, it is competent for that person, if sued, to plead in abatement that he has other partners who are not joined, unless the plaintiff is thereby substantially injured. In De Mautort v. Saunders, 1 B. & Ad. 398, a bill of exchange was drawn on and accepted by Saunders Brothers & Co., London. The firm, Saunders Brothers & Co., consisted of two brothers, resident in London (the defendants), and of two other persons resident abroad, and not generally known to belong to the firm. The defendants pleaded in abatement the non-joinder of their two copartners, and the case of Dubois v. Ludert was relied upon. But it was left to the jury to say whether the holder of the bill might not reasonably suppose that the defendants alone constituted the firm, and that, if he had reasonable ground so to think, he must be taken to have contracted with them alone, and to be entitled to a verdict. The jury having found for the plaintiff, the court held that the question had been properly submitted to the jury, and that Dubois v. Ludert could not be supported. In Bonfield v. Smith, 12 M. & W. 405, the defendant and his brother were partners, and carried on business under the firm of Bush & Co., but the defendant was the only person known to the plaintiff as constituting the firm. The plaintiff having sued the defendant for goods sold and delivered, the defendant pleaded in abatement the non-joinder of his brother. The jury were directed that a partnership between the defendant and his brother was proved, but that, if the *defendant* gave the plaintiff reason to believe that he alone constituted the firm of Bush & Co., he would be solely liable. The jury found for the defendant. A new trial was moved for on the ground that the real question, as stated in De Mautort v. Saunders, was whether the plaintiff had reasonable ground to consider the defendant as Bush & Co., but the court held that unless the plaintiff's belief was founded on the defendant's conduct or representations, the defendant had a right to insist on his partner being sued in the action, and a new trial was refused. In Dubois v. Ludert the defendant carried on business in his own name, and there was no reason to suppose that he had a partner; but in each of the other two cases the defendants carried on business under a partnership style, Saunders Brothers & Co., and Bush & Co., and there was, therefore, at all events, reason to suppose that they had partners, it then became a question for the jury whether the defendants had done any thing to lead the plaintiff to suppose they had not; in De Mautort v. Saunders it was found that they had; so in Stansfeld v. Levy, 3 Stark. 8; whilst in Bonfield v. Smith it was found that they had not. It follows from the last-mentioned cases that, notwithstanding Dubois v. Ludert, if a person carries on business in his own name, and incurs debts in so doing, he may be sued alone for such debts, and that he cannot successfully plead in abatement the non-joinder of a dormant partner. See, too, Mullett v. Hook, Moo. & Mal. 88, Baldney v. Ritchie, 1 Stark. 388; Doo v. Chippenden, Abbott on Shipping, 84; Colson v. Selby, 1 Esp. 452. The same rule holds whenever a partner enters into a written contract in which he does not disclose the fact that he is acting for other people, for although they may be sued, he cannot insist that they shall be sued. See Higgins v. Senior, 8 M. & W. 834, where the plaintiff knew that the defendant was acting as agent." Persons who deal with a firm of which there are dormant partners, without any knowledge of them, may still sue all the members of the firm or the ostensible partners only. Ex parte Norfolk, 19 Ves. 458; Ex parte Watson, id. 459; Ex parte Hamper, 17 id. 403; Ex parte Hodgkinson, Cooper, 101. And it has also been held that in a suit by the firm it is at the option of the plaintiffs to make a dormant partner a party to the suit. Wilson v. Wallace, 8 S. & R. (Penn.) 55; Clarkson v. Carter, 3 Cow. (N. Y.) 85; Boardman v. Keeler, 2 Vt. 65; Skinner v. Stocks, 4 B. & Ald. 437; Alexander v. Barker, 2 Crompt. & J. 133; Cothay v. Fennell, 10 B. & C. 671.

had been entered into with A during the partnership. The Court of King's Bench held that he had no right to do so after the dissolution of the partnership; but Lord Tenterden said that it was unnecessary to decide whether, if A had continued in the partnership till the expiration of the five years during which the contract made by him was to continue in force, the action in the joint names of him and his partner might not have been maintained.[1]

Nominal partners.

SEC. 684. Generally, a *nominal partner* need not join as a co-plaintiff in an action on a contract made by the firm. On the contrary, he may be called as a witness for the plaintiffs,[2] though, in such case, the plaintiffs must show clearly at the trial that the nominal partner had no interest whatever in the concern.[3] In a case where an attorney carried on business under the firm of "A & Son," and the son was not in fact a partner, but acted as a clerk to his father, with a salary, it was held clearly that A might maintain an action in his own name alone, for business done as an attorney. And Parke, J., observed that a party with whom the contract was actually made might sue, without joining others with whom it was apparently made.[4]

Where, however, an action is brought by the firm on a bill of exchange, drawn in the names of the real and nominal partners, as representing the style of the firm, in such case the nominal partners should join as plaintiffs. In a case where an action on such a bill was brought by the real partner only, the nominal partner being in fact a clerk, having no share in the profits, but only a fixed salary, Lord Ellenborough nonsuited the plaintiff. And it is to be remarked that his Lordship's observations on this occasion seem applicable to *all* cases of nominal partnership. "There being such a person as Hughes (the clerk), I am clearly of opinion that he ought to have been joined as a partner. He is to be considered in all respects a partner, as between himself and the rest of the world. Persons in trade had better be very cautious how they add a *fictitious* name to their firm, for the purpose of gaining credit. But where the name of a *real* person is inserted, with his own consent, it matters not what agreement there may be between him and those who share the profit and loss. They are equally responsible, and the contract of one is

[1] Robson v. Drummond, 2 B. & Ad. 303.
[2] Parsons v. Crosby, 5 Esp. 199; Davenport v. Rackstraw, 1 Carr. & Payne, 89; Glossop v. Colman, 1 Stark. 23.
[3] Teed v. Elworthy, 14 East, 210.
[4] Kell v. Nainby, 10 B. & C. 20.

the contract of all. In this case the declaration states that the defendant promised to pay the money specified in the bill to the plaintiff jointly with another person. The variance is fatal." [1]

Infant partners.

SEC. 685. An *infant partner* must, it seems, join in an action by the firm for recovery of a debt due to the firm, for this mode of suing gives the defendants an opportunity of setting off, against a debt con-

[1] Guidon v. Robson, 2 Camp. 302.

Partners as plaintiffs.—The general rule is that all the partners must join to enforce a partnership claim; Gallot v. McCluskey, 18 La. An. 259; Cochran v. Cunningham, 16 Ala. 448; Dob v. Halsey, 16 Johns. (N. Y.) 34; Snodgrass v. Broadwell, 2 Litt. (Ky.) 353; Saul v. Kuger, 9 How. (N. Y.) Pr. 569; Hughes v. Boring, 16 Cal. 81; and this though the partnership is dissolved; Wright v. Williamson 3 N. J. L. 678; and it has in some states been held that a dormant partner must join in the suit; Secor v. Keller, 4 Duer (N. Y.), 416. But a contrary doctrine is held in others. Speake v. Prewitt, 6 Tex. 252; Monroe v. Ezzell, 11 Ala. 603; and this doctrine seems recognized especially where the party dealt solely with the ostensible partner. Wood v. O'Kelly, 8 Cush. (Mass.) 406; Clarkson v. Carter, 3 Cow. 84; Clarkson v. Miller, 4 Wend. (N. Y.) 628; Rogers v. Kichline, 36 Penn. St. 293; Curtis v. Belknap, 21 Vt. 433; Ward v. Leviston, 7 Blackf. (Ind.) 466. And a partner to whom a note and mortgage is given to secure a debt due the firm may maintain an action thereon in his own name. Trott v. Irish, 1 Allen (Mass.) 481. And the same doctrine is held in New York, where the business respecting which the action is brought is uniformly done in the name of the party suing. Platt v. Hallen, 23 Wend. (N. Y.) 456.

Firm name.—The general common-law doctrine is that a partnership cannot sue in the name and style of the firm, but the suit must be in the names of the individuals composing it; and a complaint or declaration may be demurred to on this ground. Gilman v. Cosgrove, 22 Cal. 356; Dawes v. Blackford, 4 Blackf. (Ind.) 50; Heaston v. Cincinnati, etc., R. Co., 16 Ind. 275; Seeley v. Schenck, 2 N. J. L. 75; Barnes v. Hall, 8 id. 984; Tomlinson v. Burke, 10 id. 295; Potter v. Cresson, 10 S. & R. (Penn.) 257; Pate v. Bacon, 6 Munf. (Va.) 219; Smith v. Canfield, 8 Mich. 493; Crawford v. Collins, 45 Barb. (N. Y.) 269; 30 How. Pr. 398; Andrews v. Ennis, 16 Tex. 45. But in various states the statutes provide that partnerships may sue and be sued in the partnership name. Gordon v. Jenny, 1 Mor. (Iowa) 182; Johnson v. Smith, id. 105; Abernathy v. Latimore, 19 Ohio, 286; Hammersmith v. Espy, 18 Iowa, 439; Davis v. Buchanan, 12 id. 575; Markham v. Buckingham, 21 id. 535. In Iowa it is provided by statute that where two or more are bound by contract, whether jointly or severally, or severally only, the action may be brought against either or all of them; and it has been held in that state that an action might be maintained against one partner alone upon the partnership note executed in the firm name. Ryerson v. Hendrie, 22 Iowa, 480. In a recent case, in the supreme court of the United States, where the complainant in chancery sued as administrator of a deceased partner, praying an account of partnership concerns, and alleged in his bill that he was the sole heir of the deceased partner, it was held that the fact that he was not the sole heir did not make the bill abate for want of necessary parties, since a decree in his favor as administrator would not interfere with the rights of others who might claim a distribution after the complainant received the money decreed to him. Moore v. Huntington, 17 Wall. (U. S.) 417. So, in Alabama it has been held that a judgment against a partnership in firm name alone will support an action against an individual member of the firm to enforce his individual liability for the firm debts. Cox v. Harris, 48 Ala. 538. When a person is not known in the firm as a partner, by persons dealing with it, and there is nothing to indicate his connection therewith, he may properly be treated as a dormant partner, and is not a necessary party to an action against the firm. North v. Bloss, 30 N. Y. 374.

tracted with the firm, any demand upon it contracted with the infant in the name of the partnership.[1]

Bankrupt partners.

SEC. 686. Generally, when one partner becomes bankrupt, the solvent partner must sue jointly with the assignees of the bankrupt partner, on contracts made with the partnership,[2] and if the assignees refuse to join in the action, the solvent partner may use their names.[3] It follows, that if, after the bankruptcy of one partner, all the partners sue, the bankruptcy may be pleaded in bar of the action.[4] It has been held, however, that money paid to the defendant's use by a solvent partner, out of his separate property, after the bankruptcy of his copartner, in pursuance of a contract made before the bankruptcy, may be sued for in the name of the solvent partner only, without joining the assignees of the bankrupt partner.[5]

[1] Teed v. Elworthy, 14 East, 210. D. Bayley, J., Goode v. Harrison, 5 B. & A. 157. Perhaps, it should be said, that the infant ought to join for the sake of conformity. The reason given in the text, which is warranted by the authorities referred to, seems inconsistent with the notion that the contract of an infant for purposes of trade is void, which is the doctrine laid down in Thornton v. Illingworth, 2 B. & C. 826. Bayley, J., there says: "In the case of an infant, a contract made for goods for the purposes of trade is absolutely void, not voidable only. The law considers it against good policy that he should be allowed to bind himself by such contracts. If he makes a promise after he comes of age, that binds him, on the ground of his taking upon himself a new liability, upon a moral consideration existing before; it does not make it a legal debt from the time of making the bargain." There is, however, considerable difference of opinion on the nature and effect of an infant's contract in these cases. See the judgment of Best, J., in Goode v. Harrison, 5 B. & A. 157.

[2] Thomason v. Frere, 10 East, 418.

[3] Whitehead v. Hughes, 2 Cromp. & Mees. 318; 4 Tyrwh. 92. But the assignees may stay the proceedings till he gives security for costs. Id.

[4] Eckhardt v. Wilson, 8 T. R. 140.

[5] Thacker v. Shepherd, 2 Chit. 652. In case of bankruptcy, all actions by the firm should be in the name of the solvent partners and the assignee of the bankrupt. Thompson v. Frere, 10 East, 418; Waugh v. Austin, 3 T. R. 437.

Bankruptcy.—But if the bankrupt has not been discharged it has been held that actions at law might be commenced against the firm in the name of all the members, including the bankrupt. Tuttle v. Cooper, 10 Pick. (Mass.) 291. If one has been discharged in bankruptcy, the others would of course be liable for the claims against the firm, less any sum which might have been received on the same on a dividend of the bankrupt's estate.

"If a partner becomes bankrupt," says Mr. Lindley, "his assignees must join in his stead in any action in which, had no bankruptcy intervened, the bankrupt himself would have been necessarily joined as a plaintiff. If the assignees decline to join, the solvent partners are entitled to make use of their names upon indemnifying them against the costs of the action. If all the partners are bankrupt, any action which, if bankruptcy had not intervened, it would have been necessary to bring in the name of all the partners, must be brought by their assignees. But this is subject to the qualification that bankrupts, whether partners or not, may sue in their own names as trustees for other people."

As regards actions against a firm, one or more of the members of which have become bankrupt, it need hardly be observed that there is no remedy by action against assignees in respect of liabilities of the bankrupt they represent. The only remedy is by proof against his estate, or by proof and by an action against him if he has not obtained his certificate, or if his certificate is no bar." Lind. on Part. 406, and notes.

Death of partner.

SEC. 687. When one or more of several obligees, covenantees, partners, or others, having a joint legal interest in the contract, dies, the action must be brought in the name of the survivor, and the executor or administrator of the deceased cannot be joined,[1] and when the last survivor dies, his executors or administrators alone can sue, and the personal representatives of the partner who first died cannot be joined.[2] If a plaintiff die pending the action, the writ or action shall not be thereby abated, but such death being suggested on the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs.[3]

Demurrer in case it appears there should be other parties.

SEC. 688. In all cases of contract, it it appears on the face of the pleadings that there are other obligees, covenantees, or parties to the contract, who ought to be, but are not joined in the action, it is fatal on demurrer, or on motion in arrest of judgment, or on error. If the objection does not appear on the face of the pleadings, the defendant may avail himself of it by plea in abatement, or as a ground of

[1] Chit. Pl. 11; Hall v. Huffam, 2 Lev. 188; Kemp v. Andrews, Carth. 170; Webber v. Tyvell, 2 Saund. 122; Martin v. Crompe, 1 Lord Raym. 340; Com. Dig., tit. Merchant, (D.)

[2] Chit. Pl. 11.

[3] 8 & 9 Will. 3, c. 71, s. 7.

In case of death of partner "With respect to changes caused by death, the maxim, *jus accrescendi inter mercatores locum non habet*, the real meaning of which will be explained hereafter, has no application to rights of action. If, therefore, a partner dies in the life-time of any one or more of his copartners, all actions brought in respect of any contract entered into by or on behalf of the firm before his death, must be brought by or against the surviving members of the firm, and by or against them alone, for the representatives of the deceased partner can neither sue nor be sued at law in respect of any such contract. Dixon v. Hammond, 2 B. & Ald. 310, which shows that an agent of the firm must account to the surviving partners. See, too, Martin v. Crompe, 1 Ld. Raym. 340, and 2 Salk. 444; and Webber v. Tyvill, 2 Wms. Saund. 121, *e*. So an action for the conversion of partnership goods must be brought by the surviving partners; Kemp v. Andrews, Carth. 170; but see Buckley v. Barber, 6 Ex. 164; although an indictment for stealing them may be preferred by the surviving partners and the next of kin of the deceased partner. R. v. Gaby, Russ & Ry. 178; R. v. Scott, id. 13.

It follows from the above rule that the last surviving partner, or, if he is dead, his legal personal representative, is the proper person to sue and be sued at law in respect of the debts and engagements of the firm. Richards v. Heather, 1 B. & Ald. 29; Calder v. Rutherford, 3 Brod. & B. 302. In declaring against a surviving partner it is not necessary that he should be described as such. Id.; Mount Stephen v. Brooke, 1 B. & Ald. 224. But in a declaration by a surviving partner the rule is different. Jell v. Douglass, 4 B. & Ald. 374; 2 Wms. Saund. 121; Atwood v. Pattenbury, 5 J. B. Moo. 209. The reason for this is that in actions against partners one may be sued alone subject to a plea in abatement, which in the case supposed cannot be pleaded, whilst in actions by partners all must join, and if there is only one left that fact should appear, as otherwise there will be a variance between the contract alleged and that proved. It is, however, apprehended that an amendment would now be allowed if in a declaration by a surviving partner he is not described as such." Lind. on Part. 405.

nonsuit at the trial, upon plea of the general issue.[1] It has been sometimes held that if a defendant, in an action brought against him by one partner only, on a partnership contract, pays money into court, although only upon a general *indebitatus* count, this is an admission that he is content to treat the contract as made with the plaintiff only, and that the plaintiff in such case is not to be nonsuited.[2] But this doctrine seems now to be overruled.

In case of misjoinder or the joinder of more persons than those who are interested in the suit, the plaintiffs will be nonsuited.[4] But the misnomer of one of several plaintiffs cannot be taken advantage of by the defendant by plea in abatement, though he has a right to amend the declaration at the costs of the plaintiffs.[5]

Of the parties to an action ex delicto.

SEC. 689 Where there is a joint damage, or an injury is committed to the joint property of a partnership, all the partners ought to join as plaintiffs;[6] and the rule extends to actions for words spoken of the partners in the way of their trade.[7] And with regard to these latter actions it has been said that if a copartnership be libeled, and the libel contains something which particularly affects the character of one of the firm, a joint action may be maintained against the libeler, who would have less reason to complain of such proceedings than he would have if each partner brought a separate action for the injury done to the firm.[8]

These observations apply to cases where the injury, more or less, is done to the whole firm. But if, by any possibility, the injury be done to some only of the firm, they who are injured may bring a joint action for the injury; for tort is in its nature joint and several, and in the case supposed it is to a certain extent several. Hence, it has been ruled that, if a person collude with one partner to injure the others, those others can maintain a joint action against the person so colluding; and the special damage may be laid as their joint damage, although they may have no joint fund independent of the general

[1] Where the action is brought on a bill of exchange, the general issue cannot be pleaded. Reg. Gen. H. T. 1834.

[2] Walker v. Rawson, Moody & Rob. 250, and see 1 B. & Ad. 673.

[3] Kingham v. Robins, 5 M. & W. 94.

[4] Wilsford v. Wood, 1 Esp. 182. See Brandon v. Hubbard, 4 Moore, 367; 2 Brod. & Bing. 11.

[5] 3 & 4 Will. 4, c. 42, s. 11; Jowett v. Charnock, 6 M. & S. 45. See Clerk of Taunton Market v. Keinberley, 2 W. Bl. 1120.

[6] Bac. Abr. Joint-Tenant (K.); Co. Litt. 198, a; Sedgworth v. Overend, 7 T. R. 279; Bloxam v. Hubbard, 5 East, 407; J. S. Saund. Plead. & Ev., tit. Partners, 1.

[7] Cook v. Batchelor, 3 Bos. & Pul. 150; Bromage v. Prosser, 4 Barn. & Cres. 247; 6 Dowl. & Ryl. 296.

[8] Per Best, C. J., 3 Bing. 456.

three partners for the recovery of partnership goods, it was held not to be a good objection in bar of the action, "that the plaintiff and the deceased partners were joint merchants, and that they were possessed of these goods as merchants, and that, by the law of the land, there is no survivorship between joint merchants," because the action must necessarily survive, though the interest doth not.[1]

In actions in form *ex delicto*, and which are not for breach of contract, if a party who ought to join be omitted, the objection can only be taken by plea in abatement, or by way of apportionment of the damages on the trial; and the defendant cannot, as in actions in form *ex contractu*, have the benefit of a nonsuit, or demur, or move in arrest of judgment, or support a writ of error, though it appear upon the face of the declaration, or other pleading of the plaintiff, that there is another party who ought to have joined.[2]

On the other hand, it should seem that, where the action is substantially and necessarily founded on a contract, the form of it in tort will not prevent the plaintiff from being nonsuited for the non-joinder of other persons interested.[3]

If one of several part-owners of a chattel sue alone for a tort, and the defendant do not plea in abatement, the other part-owners may afterward sue jointly, and perhaps severally, for the injury to their undivided shares; and the defendant cannot plead in abatement to the latter action.[4] In the cases referred to, the chattel was wholly

several persons acting together, is legally imputable to them all jointly. See 2 Wms. Saund. 117, b and c; 1 Chitty's Plead. 96–97; but supposing a tort to be imputable to a firm, an action in respect of it may be brought against all or any of the partners. If some of them only are sued, they cannot insist upon the other partners being joined as defendants; Sutton v. Clarke, 6 Taunt. 29; and this rule applies even where the tort in question is committed by an agent or servant of the firm, and not otherwise by the firm itself. Therefore, an action may be sustained against any one or more of the partners for the recovery of damages for an injury arising from the carelessness of a servant of a firm, and the partners sued cannot plead in abatement the non-joinder of the other partners. Mitchell v. Tarbutt, 5 T. R. 649; Ansell v. Waterhouse, 6 M. & S. 385. But there is a distinction between ordinary actions of tort and those which are brought against persons in respect of their common interest in land, for if one only of several joint tenants or tenants in common is sued for any injury arising from the state of their land, the non-joinder of the other co-tenants may be pleaded in abatement; Lindley on Partnership, 401; 1 Wms. Saund. 291, f and g, and Mitchell v. Tarbutt, 5 T. R. 649; and this rule applies to partners as well as to persons who are not partners."

[1] Kemp v. Andrews, Carth. 170.

[2] 1 Chit. Pl. p. 55; Cabell v. Vaughan, 1 Saund. 291 g; Nelthorpe v. Dorrington, 2 Lev. 113; Blackburn v. Graves, 1 Mod. 102; Coryton v. Litheby, 2 Saund. 116. Formerly, if one of two tenants in common brought an action, and disclosed that title in his declaration, it was ground to arrest the judgment. Hamon v. White, Sir W. Jones, 142. But see Lord Kenyon's observations on that case, in Addison v. Overend, 6 T. R. 766; and Lord Ellenborough's, in Bloxam v. Hubbard, 5 East, 407.

[3] 1 Saund. 291, k (c.)

[4] Addison v. Overend, 6 T. R. 763; Sedgeworth v. Overend, 7 id. 279.

destroyed. But it may be laid down generally that, subject to a plea in abatement, persons who are jointly interested in a chattel, and who have made a joint demand of it, may, notwithstanding, maintain separate acts of trover in respect of it, against a person who unjustly *detains it.*[1]

Of the declaration.

SEC. 690. There is little to be said on the form of the declaration. The plaintiffs must be described as carrying on trade under the name and firm of A, B & Co., if such be the fact; but it seems that any other additions, not bearing on the merits of the case, will be considered surplusage, and need not be proved.[2] The omission in the declaration of the names or surnames of any of the plaintiffs was formerly ground of nonsuit,[3] but probably this rule will receive some qualification.

Where a surviving partner sues on a contract made with the partnership, the fact of his being survivor should appear on the face of the declaration.[4] Although, however, he should expressly declare as surviving partner, he may include in his declaration a count for a debt due to him in his own right.[5]

A surviving partner, although suing in respect of a partnership transaction, should sue in his own right and not as a survivor, when the cause of action did not arise between the partnership and the person sued. Thus, A and B were partners. R owed a sum of money to the firm of A & B; A died; R's trustees then paid the money to X. It was held that in an action against X for money had and received, B ought to sue in his own right, and not as surviving partner of A. And Buller, J., said, not only that the action was properly brought, but that it could not have been brought in any other form.[6]

When the surviving partner sues on a bill of exchange, indorsed to the firm in blank, it is not necessary for him to state that he sues as surviving partner; for an indorsement in blank of a bill of exchange conveys a joint right of action to as many as sue on the bill, or a separate right of action to him who alone sues.[7]

Joint interest. Joint action.

SEC. 691. The joint interest in the subject of the action should appear in the declaration.

---

[1] Bleaden v. Hancock, 4 Car. & P. 152.
[2] Aguttar v. Moses, 2 Stark. 499.
[3] Longridge v. Brewer, 1 Bing. 143. See 3 & 4 Will. 4, c. 42, s. 11.
[4] Jell v. Douglas, 4 B. & A. 374; Israel v. Simonds, 2 Stark. 356.
[5] Slipper v. Stidstone, 5 T. R. 493; 1 Esp. 47.
[6] Smith v. Barrow, 2 T. R. 476.
[7] Ord v. Portal, 3 Camp. 239. See Atwood v. Rattenbury, 6 Moore, 579.

In an action on a guaranty, addressed to one of two partners, but made for the benefit of both, the declaration may state that the promises were made to both.[1]

In an action to recover the amount of goods supplied by a partnership, the goods must be accurately described as belonging to the partnership. Where the goods were described as the goods of A, and it was proved that, at the time the cause of action accrued, A had a partner B, who died before the action was brought, the variance was held to be fatal, although A declared in his own name only, and not as surviving partner.[2]

Joint owners of property, insured for their joint use, and on their joint account, must, in a declaration on the policy, aver their interest to be joint. They cannot recover upon a count averring the interest to be in one of them only. Thus, in Bell v. Ansley, the[3] declaration was upon a policy of insurance, and the interest was averred to be in John Bell; and the policy was stated to be made to and for the use and benefit, and on the account of the said John Bell. The persons really interested were John Bell and his brother, William Bell, and the policy was really made for their joint use and benefit, and on their joint account; and the question was, whether, where several are jointly interested, and a policy is made on their joint account, it is sufficient to state that one of them was interested, and that the policy was made on his account; and the Court of King's Bench were of opinion that it is not. Lord Ellenborough said, that though an action upon a policy might be brought in the name of the person who effected it, though he were not the person actually interested, yet the persons interested were so far looked upon as parties to the suit that the declaration of any of them were admissible in evidence against the plaintiff, and what would be a defense against them was, in many instances, a defense against the plaintiff, and with a view to apprise the underwriter, whose declaration it might be material for him to be prepared to prove, and whose case he was to meet, he ought to be truly informed by the record for whose interest, and on whose behalf the policy was made. That it certainly was material, also, in point of public policy and convenience, that a disclosure of the true interest meant to be covered by the policy should be made, in order to exclude the property of enemies from the benefit of British insurance, and that, since the stat. 19 Geo. 2, c. 37, it had always been the practice to state the interest according to the truth.

[1] Walton v. Dodson, 3 Car. & P. 162.
[2] Ditchburn v. Spracklin, 5 Esp. 31.
[3] 16 East, 141.

Lord Ellenborough, in the preceding case, took pains to distinguish it from a case of Page v. Fry,[1] decided by the Court of Common Pleas. There the declaration averred, "that certain persons, using trade and commerce under the style and firm of Messrs. Hyde & Hobbs, were, at the time of loading the said corn on board the said ship as aforesaid, and at the time of subscribing the said writing or policy of insurance, and from thenceforth until the time of the loss hereinafter mentioned, interested in the said corn to a large amount, to wit, to the amount of all the money ever insured thereon, and that the said writing or policy of assurance so made in the name of the plaintiff was made to and for the use, risk, benefit, and account of them, the said Messrs. Hyde & Hobbs, to wit, at, etc." It appeared at the trial, that Hyde & Hobbs had through the agency of the plaintiff purchased a certain quantity of corn on their own account; that on the 27th of December, 1798, they informed the plaintiff by letter that, thinking the engagement might perhaps be too large for themselves, they had offered another house, of the name of Hacks, a joint concern in the corn, which the latter had accepted, and at the same time directed the plaintiff to effect an insurance on the cargo, which he accordingly did on the 28th January, 1799. The invoices were made out to Hyde & Hobbs; and payment for the cargo was made by them. Upon this evidence the Court of Common Pleas decided that the plaintiff had a sufficient interest throughout the entirety of this cargo, notwithstanding other persons had a beneficial interest in a part, to support the averment in this declaration. Judging, however, from the language of Lord Ellenborough in Bell v. Ansley, the correctness of this decision seems questionable.[2]

But although it is necessary that the real interest should appear on the declaration, it is sufficient to state, "that A, B, C, and D, or some or one of them, were or was interested, etc.," and "that the insurance was made for the use and benefit, and on the account of the person or persons so interested."[3] And an averment that A, B, C, D, and certain persons trading under the firm of E & Co. were interested, is sufficient on motion in arrest of judgment, whatever effect the uncertain description of the persons in the firm might have on special

[1] 2 Bos. & Pull. 240.

[2] And it seems that the case of Perchard v. Whitmore, 2 Bos. & Pull. 155, n., could not now be supported. There a declaration on a policy was held good, which stated "that A and B, until and at the time of the loss, were interested, etc." Whereas, after the insurance, but before the loss, C was introduced as a partner with A and B, and became interested in the goods. See Hughes, 467; and see Rhind v. Wilkinson, 4 Taunt. 237.

[3] Reg. Gen. Hil. T. 1834, *Assumpsit*, 4.

demurrer.[1] And where A and B, trading under the firm of A & Co., engaged in an adventure, and afterward received C and D as sharers therein, and a policy was effected on account of A & Co., in an action on the policy, it was left to the jury whether, under the words A & Co., A and B only, or whether all the adventurers, were included.[2].

It is not necessary to specify in what proportions several persons are interested.[3]

In an action on a policy by the assured, an allegation that the policy has been effected for the plaintiff by A, B, and C, will be satisfied by proof that it was effected by the firm of A & B, there being in fact two firms which have two members in common.[4]

Libel.

SEC. 692. Partners may bring an action for a libel against them in respect of their business, without showing the proportion of their respective shares, or setting out special damage. In Foster v. Lawson,[5] the declaration charged the defendant with having libeled the plaintiffs, who were bankers and copartners, by publishing of them that they had stopped payment. The defendants demurred to the declaration and in support of the demurrer it was contended that the plaintiffs could not join in an action of tort, unless they disclosed a joint interest and joint damage, and that a recovery in this action would be no bar to a separate action by each of the partners for his share in the alleged damage. But the court overruled the demurrer, observing that it was difficult to see how there could be any separate damage; the business injured was the joint business, and the libel only affected the plaintiffs through their business. That, as to proportions of interest in each partner, it was a matter with which the defendant had nothing to do. Any compensation they might recover would belong to them generally, and it was nothing to the defendant how it might be divided among them.

In connection with this subject, we may observe that it was ruled in a late case that in a joint action by two partners for a libel, damages cannot be given for an injury to their private feelings, but only for such injury as they may have sustained in their joint trade or business.[6]

Where two persons bring a joint action for a maliciously holding

[1] Wright v. Welbie, 1 Chit. 49. See Mellish v. Bell, 15 East, 4.
[2] Carruthers v. Shedden, 1 Marsh. 416.
[3] Ibid.
[4] Dickson v. Lodge, 1 Stark. 227.
[5] 8 Bing. 453; 11 Moore, 360; see Coryton v. Lythebye, 2 Saund. 116, a; Ward v. Smith, 4 Car. & P. 302.
[6] Haythorn v. Lawson, 3 Car. & P. 190.

them to bail, the complaint in the declaration must be confined to the expenses they were jointly put to in procuring their liberty.[1]

Of pleas in bar.

SEC. 693. The defendant must plead specially in bar of an action by copartners all matters in confession and avoidance of the contract, and where the action is brought on a bill of exchange or promissory note, he must always plead specially. Thus, in an action on a covenant contained in partnership articles, the defendant may crave oyer of the articles and plead the illegality of the partnership.[2] So, in an action of debt on a bond by one partner against another, the defendant may crave oyer of the bond and plead that the condition was a usurious contract of partnership.[3] Again, to an action on a bill of exchange by partners, the defendant, if he wishes to set up a partnership between himself and the plaintiffs, should plead in bar that the promises were made by him jointly with one of the plaintiffs,[4] though in other cases it is apprehended that he might give this in evidence under the general issue.

Bankruptcy.

SEC. 694. Again, the defendant may plead in bar the bankruptcy of one of the copartners.[5] So, probably, he might plead in bar that one of them is an alien enemy, or attainted of felony.[6] If the action be brought on a specialty, and sometimes even in assumpsit, the defendant may plead a release by one partner, but a release by one partner of all actions "on his own account," will not be a sufficient bar to the action.[7] And if A be bound to B and C, *solvend*, the moiety to B, and the other to C, the release of one shall not prejudice the other, and if there are several covenants in the same deed, one covenantee will not be bound by a release given by the others.[8]

In actions on bonds.

SEC. 695. It may here be remarked that to an action on a bond, a plea that the debt has been assigned, is bad, for an assignment of a chose in action is, at law, no discharge of an obligation. Therefore, to an action of debt on a bond entered into by the defendant W, as surety

[1] Collins v. Barrett, 3 Bingh. 456, cited.
[2] Lees v. Smith, 7 T. R. 338.
[3] Morse v. Wilson, 4 T. R. 353.
[4] Mainwaring v. Newman, 2 B. & P. 120; Reg. Gen., H. T. 1834.
[5] Eckardt v. Wilson, 8 T. R. 140.
[6] Bac. Abr. Abatement (N.); Com. Dig. Abatement (K.); Co. Litt. 128, b; Bullock v. Dodds, 2 Barn. & Ald. 258; Harmer v. Kingston, 3 Camp. 153.
[7] Stokes v. Stokes, 1 Ventr. 35; Lev. 272; 2 Keb. 580.
[8] Moore, 64; see Wats. Partn. 226.

for J. S., to secure the amount of his overdrawings on the plaintiffs, a plea was held bad which stated that after the making of the bond the partnership of the obligees was dissolved, and a new partnership formed by the retiring of one of the old partners and admitting a new partner; that, with the new partnership, W, with the privity of the retired partner, kept an account, and that at the time of the dissolution a balance was due from W but not demanded by the partnership, but on the contrary, that the plaintiffs agreed that it should be, and that it was transferred to the account between W and the new partnership.[1]

Tender.

SEC. 696. Where *tender* has been made to any of the partners, it may likewise be pleaded in bar of an action by the firm; but such tender should be described as made to the firm. Where A, B & C had a joint demand, and C had a separate demand on D, and D offered A to pay him both the debts, which A refused, without objecting to the form of the tender, on account of his being entitled only to the joint demand, it was held that D might plead this tender in bar of an action on the joint demand, and should state it as a tender to A, B & C.[2]

Former recovery.

SEC. 697. Where a libel has been published against partners in a matter connected with their joint trade, and one is more especially damaged, it seems that a verdict, recovered in a joint action by all the partners, could not be pleaded in bar of a separate action against the same defendant by the partner more particularly aggrieved.[3]

Statute of Limitations.

SEC. 698. If the action be not brought within six years after the cause of action has accrued, the defendant may plead the *statute of limitations*, although one partner may have been abroad within the interval.[4]

Proof of partnership.

SEC. 699. In actions by partners to recover a partnership demand, unless the contract, which is the foundation of the action, has been expressly made with all the members of the firm,[5] or unless the action

[1] Parker v. Wise, 6 Mau. & Selw. 239.
[2] Douglas v. Patrick, 3 T. R. 683.
[3] Forster v. Lawson, 11 Moore, 360.
[4] Perry v. Jackson, 4 T. R. 516.
[5] Evans v. Mann, Cowp. 569.

be brought on a bill indorsed in blank, in which case no joint interest need be proved;[1] it will be incumbent on the plaintiffs to prove that they all were partners at the time of the contract,[2] otherwise, as we have seen, they will be nonsuited.

Thus, in an action on a bill made payable or indorsed specially to the firm, the promise being only to pay a certain firm, strict evidence must be given that the firm consists of the persons who are plaintiffs.[3] And if a note be payable to a firm of A B & Co., and A B and C D sue thereon, they must prove that they were the component members of the firm at the time the note was given.[4] And even when a bill is indorsed to a firm in blank, it has been held that under special circumstances they who sue upon the bill must show that they are the persons constituting the firm to which it is indorsed. Thus, where a bill of exchange was, by the direction of the payee, indorsed in blank and delivered to A, B & Co., bankers, on account of the estate of an insolvent, which was vested in trustees for the benefit of his creditors, Lord Ellenborough held that A and B, two of the members of the firm and also trustees, could not conjointly with a third trustee, not a member of the firm, maintain an action against the indorser without some evidence of the transfer of the bill to them as trustees by the firm, by delivery or otherwise. The court at the same time observed that, had it not been for the evidence of the particular transfer to A B & Co., an indorsement in blank might have entitled the parties who brought the action to recover.[5] Generally, however, where a bill is indorsed to a firm in blank, it is not necessary that all the members should sue, and, therefore, if they sue separately, it is unnecessary that they should prove their partnership.[6]

Partnership, how proved

SEC. 700. Partnerships are usually proved by the oral testimony of clerks or other agents or persons who know that the alleged partners have actually carried on business in partnership, and it is unnecessary to produce any deed or other agreement by which the copartnership has been constituted.[7] And, if a witness called by the partners to prove the partnership is unable at the moment to specify the several names of the partners, a number of names, containing

[1] Ord v. Portal, 3 Camp. 239.
[2] Camden v. Anderson, 5 T. R. 709.
[3] Ord v. Portal *supra*.
[4] Waters v. Paynter, Chit. Bills, 389.
[5] Machell v. Kinnear, 1 Stark. 490.
[6] Ord v. Portal. 3 Camp. 239; Atwood v. Rattenbury, 6 Moore, 579.
[7] Alderson v. Clay, 1 Stark. 406.

those of the partners among others, may be suggested to him for the assistance of his memory.[1]

[1] Acerro v. Petroni, 1 Stark. 100.

Proof of partnership:— There are many ways of proving the existence of a partnership, as by the mode of making out their accounts, keeping their books, marking their boxes of merchandise, or by an acknowledgment of the partnership by the partners composing it. McNeil v. Reynolds, 9 Ala. 313; Grew v. Walker, 17 id. 824; Kellicher v. Tisdale, 23 Ill. 405; Bissel v. Hobbs, 6 Blackf. (Ind.) 479; Fall River, etc., Co. v. Borden, 16 Cush. (Mass.) 458; Johnson v. Warden, 3 Watts (Penn.), 101; Richter v. Selen, 8 S. & R. (Penn.) 360; Frick v. Barbour, 64 Penn. St. 120; Tumlin v. Goldsmith, 40 Ga. 221; Barcroft v. Haworth, 29 Iowa, 462; Frost v. Walker, 60 Me. 468. Oral evidence is usually admissible to establish it. Villa v. Jonta, 17 La. An. 9. And even where there is a written agreement of the partners, it may be shown by parol that they held themselves out as partners, and this may be shown to be the fact both before and after the execution of the obligation on which suit is brought. Bry v. Weston, 16 Me. 261; Gilbert v. Whidden, 20 id. 367; Field v. Tenny, 47 N. H. 513; Fleshman v. Collier, 47 Ga. 253; Randal v. Yates, 48 Miss. 685; Anderson v. Loan, 1 W. & S. (Penn.) 334; Dixon v. Hood, 7 Mo. 414; King v. Ham, 4 id. 275; Widdifield v. Widdifield, 2 Binn. (Penn.) 245. But it has been held that a partnership for the purchase and sale of real estate must be evidenced by writing. Gray v. Palmer, 9 Cal. 616. But, *contra*, see Chester v. Dickenson, 45 N. Y., and where it was held that it may be established by parol, and such would seem to be the rule now generally prevailing. And the proof of a partnership as between the partners must be stronger than where the question is raised between the alleged partnership and other parties. Robinson v. Green, 5 Harr. (Del.) 115; Gray v. Palmer, 9 Cal 616. In fact, if there is a written agreement between partners, this would furnish the best evidence of the agreement between them. Hastings v. Hokinson, 28 Vt. 108. Where the question arises on a claim of a creditor, any thing tending to show the partnership relation would be admissible in evidence. Thus, where two persons carried on the smithing business together, this was held *prima facie* evidence of a partnership between them. McMullan v. Mackenzie, 2 Gr. (Iowa) 368. And where there was a written agreement which alone would not constitute a partnership, it was held proper to show by parol that the parties have treated it as constituting one, and acted accordingly. Williams v. Sauter, 7 Iowa, 435; see, also, Beale v. Poole, 27 Md. 645. So it was held proper to show by a witness that he paid notes of the firm in which were the individual names of the members, and the declarations of the members made prior to the institution of the suit as evidence of a partnership between them. Woods v. Quarles, 10 Mo. 170; see, also, Ripley v. Evans, 22 id. 157. But see, as to the burden of proof under the Illinois Statutes, Kenedy v. Hall, 68 Ill. 165. So a separate admission of members of the alleged firm is competent evidence against those that make the admission of the partnership. If all in this way make the admission, it would be satisfactory evidence of the partnership. But this would not be evidence against members that did not make the admission of the existence of the partnership. Nor would the admission of one alone be competent evidence to prove a partnership. Currier v. Siloway, 1 Allen (Mass.), 19; Gordon v. Bankard, 37 Ill. 147; Drennan v. House, 41 Penn. St. 30; Campbell v. Hastings, 29 Ark. 512; Smith v. Hewlett, 67 Ill. 161; Johnson v. Galivan, 52 N. H. 143. And evidence that a person sought to be charged as a partner was often in the store conducted in the name of another; that he bought, sold, and bartered goods there; that he went to Boston and bought goods for the store; that he formerly had been a partner and that the old sign of the firm still remained upon the building, would be competent evidence as tending to show an existing partnership. State v. Wiggin, 20 N. H. 449. See, also, as to circumstances from which a partnership may be inferred, Farr v. Wheeler, 20 id. 569. So, also, as to third parties dealing with another, if he has held himself out to the world as a member, and permitted persons to deal with the firm, supposing he was a member, he cannot object to the admission of such evidence to show that he was a partner, or the admission of the partnership books and accounts kept or rendered in the name of the firm. Chidsley v. Potter, 21 Penn. St. 390. See, also, Donnawan v. House, 41 Penn. St. 30;

Partners not known in firm.

SEC. 701. We have already noticed that a mere nominal partner, having no interest in the partnership, is a competent witness for the plaintiffs to prove a contract made between the defendant and the

Benedict v. Davis, 2 McL. 347; Buckingham v. Burgess, 3 id. 364; S. C., id. 549. But mere entries in the books of a firm are not evidence that one is a member, unless the partner himself made or authorized it to be made. Robins v. Warde, 111 Mass. 518. A holding out by a person as partner would be sufficient to estop him from denying his liability as partner, where another has thereby been induced to give credit to the firm on that account, or where the creditor may reasonably be presumed to have acted on the faith of his being a partner. Dickinson v. Valpy, 19 B. & C. 140; Kell v. Rainley, 10 id. 21. Thus, if a person allows his name to remain in the firm, over a public door where it does business, or in the bills or invoices, or to be published in advertisements, he would ordinarily be held liable to creditors. Fox v. Clifton, 6 Bing. 794. But a partnership cannot be proved by general reputation. Tumlin v. Goldsmith, 40 Ga. 221; Southwick v. McGovern, 28 Ill. 533; Halliday v. M'Dougal, 20 Wend. 81; Lockridge v. Wilson, 7 Miss. 560; Carter v. Douglass, 2 Ala. 499; Smith v. Griffith, 3 Hill, 333; Sinclair v. Wood, 3 Cal. 98; Brown v. Crandall, 11 Conn. 92; Grafton Bk. v. Moore, 13 N. H. 99; Inglebright v. Hammond, 19 Ohio, 337; Scott v. Blood, 16 Me. 192; Joseph v. Fisher, 4 Ill. 137; Carlton v. Ludlow Woollen Mills, 27 Vt. 496; nor can it be shown by surprise or innuendo; Hudson v. Simon, 6 Cal. 453. And declarations of the alleged partners, unaccompanied with any acts of the parties sought to be charged as such, are inadmissible. Phillips v. Purington, 15 Me. 425. And it has been held that a person could not be charged as a partner merely on the ground of his acts and declarations as such, without showing that they were brought home to the knowledge of the plaintiff, or t hat the credit was induced on that account. Fitch v. Harrington, 13 Gray (Mass.), 468. See, also, Charman v. Henshaw, 15 id. 293. When the partnership is shown to exist, then all acts and admissions of any partner, within the scope of the partnership business and relating to it, would be binding upon the firm. But we have already considered this subject.

Presumptions. — There is a general presumption that all paper to which the name of the firm has been attached by one of the members is the firm paper and binding upon it, and that the transfer of such paper by the partner was lawful, and in order to avoid the effect of this presumption it would be necessary to furnish some evidence, as by showing that the paper was made and transferred to the holder in fraud of the rights of the other partners, or that it was received by him in payment of a private debt of the partner, without the knowledge or consent of his copartners. Bank v. Winship, 5 Pick. 11; Ethridge v. Binney, 9 id. 274; Barrett v. Swann, 17 Me. 180; Vallett v. Parker, 6 Wend. 615; Doty v. Bates, 11 Johns. 544; Powell v. Mesner, 18 Tex. 401; Hickman v. Kunkle, 27 Mo. 486; Tutt v. Addams, 24 Mo. 186; Haldemann v. Middletown, 28 Penn. St. 440; Pierce v. Jackson, 21 Cal. 636; Hurd v. Haggerty, 24 Ill. 171; Little v. Fitch, 11 Mich. 525; Clay v. Cottrell, 18 Penn. St. 408; Elliott v. Dudley, 19 Barb. (N.Y.) 326; Darling v. March, 22 Mo. 184; Gansvoort v. Williams, 14 id. 133; Joice v. Williams, id. 141; Rogers v. Batchelor, 12 Pet. (U. S.) 221; Zuel v. Bowen, 78 Ill. 234; Blodgett v. Weed, 119 Mass. 215; National Union Bank v. Landon, 66 Barb. (N.Y.) 189; Graves v. Kellenbarger, 51 Ind. 66; Smith v. Sloan, 37 Wis. 285; Prince v. Crawford, 50 Miss. 344; Carrier v. Cameron, 31 Mich. 373; but a check previously drawn cannot be issued after a dissolution so as to bind the firm. Gale v. Miller, 54 N. Y. 536.

A bill of exchange or promissory note thus affected by the fraud of the immediate parties to it would, however, be good against the firm in the hands of a *bona fide* holder for value. But when it is once shown to be fraudulently executed, the burden of proving that the holder paid a valuable consideration for it, and received it in good faith, would devolve upon the holder. Munroe v. Cooper, 5 Pick. (Mass.) 412; Smith v. Lusher, 5 Cow. 689; Catskill Bank v. Stall, 15 Wend. (N. Y.) 364; Vernon v. Manhattan Co. 17 id. 325; 22 id. 251; Rich v. Davis, 4 Cal. 22; Emerson v. Harmon, 14 Me. 271; Waldo Bank v. Lumbert, 16 id. 416; Dudley v. Littlefield, 21 id. 418; Freeman v. Ross, 15 Ga. 252.

plaintiffs in the joint names of the plaintiffs and the nominal partner.[1] And it has been held that a person, who has purchased from the plaintiff an interest in the contract in which the action is brought, is a competent witness to prove the contract.[2] By reason, also, of the necessity of the thing, a broker who is to have a share of the profits, or who is to have all he can get beyond a certain sum, is a good witness for the principal in an action brought by the latter for goods sold and delivered.[3] But in general, a copartner with the plaintiff cannot be admitted as a witness to prove the contract, not only for reasons connected with the pleadings, but also on the ground of interest. And it appears that he cannot be rendered competent by the provisions of the stat. 3 & 4 Will. 4, c. 42, that statute not applying to partners.[4] It has even been held that in an action on a charter-party, a person who is a partner with the plaintiffs, though not one of the registered owners, is not a competent witness for the plaintiffs, unless cross releases are executed between him and them.[5]

Declarations of one partner as evidence.

SEC. 702. Evidence of the partnership having been given, the declaration of one partner is evidence against another partner,[6] and will be good ground of defense at the trial.[7] Therefore, where a contract was made by one of several partners in his individual capacity, who at the time declared that the subject-matter of the contract was

---

The fact that a partner, upon being informed of the use of a firm note, for the debt of one of the partners, did not deny liability thereon, is not *per se* a ratification or indorsement of the act, though it may be a circumstance tending to show it. Rubin v. Cohen, 48 Cal. 545. But subsequent ratification may be shown by circumstances to bind the other partners. First National Bank v. Breese, 30 Iowa, 640; Markham v. Hazen, 48 Ga. 570. And it would be a defense to it in the hands of an indorsee, if but for his gross negligence he would have learned of the fraud in the issuing of the bill or note. New York, etc., Co. v. Bennett, 5 Conn. 574; Smyth v. Strader, 4 How. (U. S.) 404.

[1] Parsons v. Crosby, 5 Esp. 199; Glossop v. Colman, 1 Stark. 25.

[2] Mawman v. Gillett, 2 Taunt. 325, n. In an action against a certificated conveyancer for negligence in managing the purchase of an annuity for the plaintiff, a joint purchaser is a competent witness for the plaintiff. Rothery v. Howard, 2 Stark. 68.

[3] Benjamin v. Porteus, 2 H. Bl. 590.

[4] Jackson v. Galloway, 8 C. & P. 480; and see Jesus Coll. v. Gibbs, 1 You. & Coll. 155; Braithwaite v. Coleman, 2 Harrison's Index, 1046; see *post*, chap. 6, sec. 8. By 3 and 4 Will. 4, c. 42, s. 26, if any witness be objected to as incompetent, on the ground that the verdict or judgment in the action in which it shall be proposed to examine him would be admissible in evidence for or against him, such witness shall, nevertheless, be examined; but in that case a verdict or judgment in that action, in favor of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him; nor shall a verdict or judgment against the party, on whose behalf he shall have been examined, be admissible in evidence against him or any one claiming under him.

[5] Jackson v. Galloway, *supra*.

[6] Robson v. Curtis, 1 Stark. 78.

his property alone, it was held that this declaration was evidence against the other partners, and that a joint action by the firm was not maintainable.[1] So, where it appeared on the record that the agreement, out of which the cause of action arose, was made by the plaintiff on behalf of himself and other proprietors, it was held that declarations made by one of such proprietors were admissible evidence on the part of the defendants.[2] So, in an action brought by copartners, one of the plaintiffs, being willing to do so, was permitted to give evidence for the defendant, and thereby to defeat the action; for it was said that if his declaration before action brought was available against his copartner, it must be equally available at the trial.[3] On the same principles, if, upon the dissolution of the partnership of A and B, it is agreed that A shall receive some of the partnership debts, and B others, in an action by B against a debtor of the firm, A may be called to prove that he has received payment from the defendant, according to the agreement.[4]

[1] Lucas v. De la Cour, 1 Man. & Sel. 249.

[2] Kemble v. Farren, 8 Car. & Payne, 623.

[3] Norden v. Williamson, 1 Taunt. 378.

[4] Evans v. Silverlock, 1 Peake, 31. So, A might be called to prove that he had received payment contrary to the terms of the agreement, and the defendant would be discharged. See 4 Car. & Payne, 108.

Admissions.— The general rule is that where the partnership is shown to exist, the admission of one partner may be received to charge the partnership, in relation to matters during the existance of the partnership, and within the scope of its business. Phillips v. Purington, 15 Me. 425; Gulic v. Gulic, 14 N. J. L. 578; Walle v. Brown, 4 Whart. (Penn.) 365; Ordiorne v. Maxcy, 15 Mass. 39; Cook v. Castner, 9 Cush. 266; Anderson v. Wanzer, 6 Miss. 587; Griswold v. Haven, 25 N. Y. 595; Fisk v. Copeland, 1 Overt. (Tenn.) 383. So partnership is liable for the false and fraudulent representations of one of its members, relative to matters following within the scope of its business. An innocent third party, dealing on the strength of such representations, and being damaged thereby, may maintain an action therefor, or defend on that ground. Stockwell v. Dillingham, 50 Me. 442. And where there is a partnership, the confession of one member of any fact tending to bind the whole, in a matter relating to the joint concern, is good evidence against the whole. Ordiorne v. Maxcy, 15 Mass. 39. But a declaration of a deceased partner, that a liability incurred by a third person in borrowing money was at his request, and for the benefit of the firm, was held in the absence of other evidence not sufficient to bind the firm. Thorn v. Smith, 21 Wend. 365. It may here be observed that in many, if not most of the States, the interest of a witness does not disqualify him from being a witness, and that parties to suits may be witnesses for themselves, the matter of their interest only going to their credibility. And the general rule is, that one partner cannot, by his admission, bind another after the dissolution of the partnership, in any manner. Dispham v. Patterson, 2 McLean, 87; Lansing v. Gaine, 2 Johns. (N. Y.) 300; Burns v. McKenzie, 23 Cal. 101; Daniel v. Nelson, 10 B. Mon. (Ky). 316; Hamilton v. Somers, 12 id. 11; Pope v. Risley, 23 Mo. 185; Conery v. Hayes, 19 La. An. 325; Bank of Vergennes, 7 Barb. 143. Nor can he execute a note or make any new contract in the name of the firm. Bell v. Morrison, 1 Pet. (U.S.) 351; Neal v. Hassan, 3 McCord (S. C.), 278; Chase v. Kendall, 6 Ind. 304; Palmer v. Dodge, 4 Ohio St. 21; Perrine v. Keene, 20 Me. 355; Speake v. White, 14 Tex. 364; Bank v. Baugh, 16 Miss. 290; Sutton v. Dillaye, 3 Barb. 529; Whitehead v. Bank, 2 W. & J. 172; Cunningham v. Bragg, 37 Ala. 436; Burr v. Wil-

In an action of assumpsit or debt brought by partners, the defendant may give in evidence a release by one of them. Where an action was brought by several partners, as indorsees of a promissory note, against the defendant as indorser, and it appeared in evidence that one of the partners had discharged a prior indorser by a deed of composition, it was held that such deed operated as a release to the defendant.[1]

A receipt signed by one partner may likewise be given in evidence in defense to an action by the firm. But as a receipt is only *prima facie* evidence of payment, the partners may rebut that evidence by showing that it was fraudulently given by their co-plaintiff.[2]

Proof of dissolution.

SEC. 703. Where the defense is that the partnership of the plaintiffs was dissolved before the cause of action accrued, and, therefore, that there is a misjoinder, the defendant may put in evidence the Gazette containing a notice to that effect, or he may put in a written notice signed by the parties. It has been ruled that a notice of the latter kind, drawn up for the purpose of being inserted in the Gazette, is sufficient evidence of dissolution for all purposes against the parties signing, and that no objection can be raised in such case as to the mode of dissolution, inasmuch as the partnership will be presumed to have been dissolved by competent means.[3] It must be observed, however, that, for the purposes of evidence just mentioned, instructions for advertising the dissolution, written in the form of an agreement, and signed by the parties, require an agreement stamp,[4] though a notice of dissolution in the Gazette may be given in evidence without a stamp.[5]

Misjoinder may be proved.

SEC. 704. Where an action of assumpsit, other than on a bill of exchange or promissory note, is brought by A against B, the latter may, under a plea of non-assumpsit, give evidence that the subject-matter of the action has arisen out of partnership transactions between A and B, and thereupon the plaintiff may be nonsuited.[6] Where the defense is that the promises were made to the plaintiff jointly with C, the defendant may call upon C to prove this defense.

liams. 20 Ark. 171; Chamberlain v. Bancroft, 24 Ga. 310; Richardson v. Moies, 31 Mo. 430; Lange v. Kenedy, 20 Wis. 279.

[1] Eilison v. Dezell, 1 Selw. N. P. 364.

[2] Farrar v. Hutchinson, 1 Per. & D. 437.

[3] Doe v. Miles, 4 Camp. 378.

[4] May v. Smith, 1 Esp. 282.

[5] Jenkins v. Blizzard, 1 Stark. 420.

[6] Pearson v. Skelton, 1 Mees. & Wels. 504; Worrall v. Grayson, 1 id. 166.

[7] Davies v. Evans, 6 C. & B. 619.

Evidence in actions for torts.

SEC. 705. As to evidence in actions of tort by partners, there is little to be said. It is obvious, however, that in an action by partners for a tort, it must be made clear to the jury that the tort affected the plaintiffs jointly. In Solomons v. Medex,[1] the declaration alleged that the defendant spoke of and concerning the plaintiffs, in their trade, these words: "You (meaning the said partners) have bought a pearl necklace which was stolen from me, for less than one-seventh of the value. Will you give up the necklace, otherwise I will take you to Bow street?" It appeared that the three plaintiffs carried on business in partnership as silversmiths, and that the words were spoken by the defendant in their shop, and addressed to J. S. (one of the plaintiffs) alone, the other plaintiffs not being present. Lord Ellenborough held this evidence insufficient to support the declaration, and nonsuited the plaintiffs.

Of indictments by partners.

SEC. 706. A few remarks relative to indictments by partners should not be omitted.

By the 7 Geo. 4, c. 64, s. 14, it is enacted: "That in any indictment or information for any felony or misdemeanor, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be; and whenever, in any indictment or information for any felony or misdemeanor, it shall be necessary to mention, for any purpose whatsoever, any partners, joint tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision shall be construed to extend to all joint-stock companies and trustees."

But although it is not necessary to name all the partners, yet where there are other partners, that fact should appear in the indictment, otherwise the prisoner must be acquitted.[2]

It is not necessary that the property of the thing taken should be the strict legal property of the partners. Thus, in Scott's case,[3] a

[1] 1 Stark. 193.
[2] See Arch. Peel's Acts, 11.
[3] Russ. & Ryan's Cr. Ca. 13.

father and son carried on business as farmers. The son died intestate, and his wife shortly after. The father then carried on the business for the joint benefit of himself and his grandchildren, his son's next of kin. Some of the sheep were stolen, and were laid as the property of the father and his son's children, and it was held to be rightly laid. And actual possession is sufficient. D and C were partners. C died intestate, leaving a widow and children. From the time of his death the widow acted as partner with D, and attended the business in the shop. Some time after C's death, goods were stolen. A description of them in the indictment as the goods of D and the widow was held correct.[1]

By the 7 & 8 Geo. 4, c. 29, s. 47, founded on 39 Geo. 3, c. 85, it is enacted —"That if any clerk or servant, etc., shall receive or take into his possession any chattel, money or valuable security, for, or in the name, or on account of his master, and shall fraudulently embezzle the same, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, etc., was not received into the possession of such master, otherwise than by the actual possession of his clerk, servant," etc. Now, as a servant in the employment of A and B, who are partners, is the servant of each, it has been held that if he embezzle the private money of one, he may be charged, under the above enactment, as the servant of that individual partner.[2]

Equitable remedies against partners.

SEC. 707. Creditors, or persons contracting with a partnership-firm, may, likewise, where there is a defect of remedy at law, resort to a court of equity and call in aid its interference. In many instances more effectual relief is administered in equity than the forms and technicalities of the law will allow it to grant. The common law, for example, though it professes to adopt the *lex mercatoria*, has not adopted it throughout in what relates to partnerships in trade. It holds, indeed, that although partners are in the nature of joint tenants, there shall be no survivorship between them in point of interest, yet, with regard to partnership contracts, it applies its own peculiar rule, and because they are in form joint, holds them to produce only a joint obligation, which consequently attaches exclusively upon the survivors. By the general mercantile law, however, a partnership contract is several as well as joint, and courts of equity, adopting to

[1] Rex v. Gaby, Russ. & Ryan, 178. [2] Rex v. Leech, 3 Stark. 70.

its full extent that law for their guidance, have considered joint contracts of this description as standing upon a different footing from ordinary joint contracts, and have ascribed a several as well as a joint operation to them. On the ground, therefore, that each partner is liable for a partnership debt, a court of equity not only sanctions the remedy which the law gives against the surviving partner, but will likewise decree satisfaction out of the estate of a deceased partner.

To a suit in equity instituted against partners, as in a suit brought by them, all the partners must be made parties. This is necessary in compliance with the general rule, which requires that, to a bill founded on a contract, all those persons should be made parties who are parties to the contract.[1] It is also essential in order that the court may be enabled to dispense complete justice by deciding upon and settling the rights of all persons interested.[2] But a strict observance of the general rule is not enforced where the parties to be made defendants are too numerous to render it practicable to prosecute a suit, if they were all joined in it; and, therefore, an individual claiming against a numerous partnership or club, who is not himself a partner, is at liberty to file a bill against a few of the partners or members only.[3] And when one partner is resident in a foreign country, and consequently out of the reach of the process of the court, the suit may be brought against the partner who is within its jurisdiction; and if the omission be excused by the bill, the defendant will be precluded from objecting that his copartner is not made a party;[4] and if a decree be obtained against him, he will be compelled to satisfy the joint demand.[5]

So, where one of the joint owners of a cargo deposited part of the cargo with a factor to sell, and hold a moiety of the proceeds for his

[1] Humphreys v. Hollis, 1 Jacob, 75; Waggoner v. Gray, 2 H. & M. (Va.) 605; Dozier v. Edwards, 3 Litt. (Ky.) 67; see Hoy's Heirs v. McMurry, 1 Litt. (Ky.) 365.

[2] Lord Redesdale's Tr. on Pl. 133.

[3] Baldwin v. Lawrence, 2 Sim. & Stu. 26; Weale v. West Middlesex Waterworks Company, 1 Jac. & Walk. 358; Meux v. Maltby, 2 Swanst. 277; Cockburn v. Thompson, 16 Ves. 321; Weld v. Bonham, 2 Sim. & Stu. 91.

[4] Weymouth v. Boyer, 1 Ves. Jr. 416. In Cockburn v. Thompson, 16 Ves. 325, Lord Eldon said: "There are many instances of justice administered in this court, in the absence of those, without whose presence, as parties, if they were within the jurisdiction, it would not be administered." The court will not bind all the partners in a trading company, as to the construction of the articles of copartnership, as to a point of general interest in a suit by some of the partners against a committee for the management of the commercial concerns, not otherwise authorized to represent the partnership. Baldwin v. Lawrence, 2 Sim. & Stu. 26.

[5] Darwent v. Walton, 2 Atk. 510. It is usual where parties are charged by the bill to be out of the jurisdiction of the court to name them in the prayer of process, because, if they come within the jurisdiction, process may issue against them without amending the bill. But the omission of their names in the prayer of process does not render the record defective. Lord Redesdale's Tr. on Pl. 134; Haddock v. Thomlinson, 2 Sim. & Stu. 219; see Simpson et al. v. Geddes, 2 Bay (S. C.), 533.

separate creditor, it was held that the latter, to a bill filed for an account of the proceeds, need not make the other joint owner a party.[1] And where a bill was filed against two partners, of whom one was abroad, and the partner in this country admitted that he was the agent of his copartner, it was ordered, upon motion, that service of the subpœna upon the partner in England, or upon his clerk in court, should be good service upon both.[2] The relief to be obtained against partners, through the medium of a bill in equity, corresponds in almost every respect with that which is granted against an individual defendant. The number of the parties, or the fact of their being united as partners, does not necessarily make any difference or variation in the equity administered. That remains immutable, and is as rigorously exacted from those who have formed themselves into an association, as it would be were they the objects of suit in their separate capacities. It is not the parties, but the right, which is regarded. It has been holden that a court of equity has jurisdiction against a corporation on a bill for an account of the profits in the nature of a partnership, and such a bill will be entertained, not only at the instance of a member, but of a stranger.[3]

[1] Weymouth v. Boyer, *ante*.

[2] Carrington v. Cantillion, Bunb. 107, S. P.; Coles v. Gurney, 1 Madd. 187; and see Ex parte Peyton, Buck, 200. So, the answer of one joint partner in the name of both is sufficient, provided the complainant files a general replication, and takes no steps to compel an answer from the other partner. Freelands v. Royal et al., 2 H. & M. (Va.) 575.

[3] Adley v. Whitstable Company, 17 Ves. 315; S. C., 1 Meriv. 107; see, also, Attorney-General v. Governors of Foundling Hospital, 2 Ves. Jr. 42.

CHAPTER XXIX.

OF ACTIONS AGAINST PARTNERS.

SEC. 706. Of the process.
SEC. 709. Personal service necessary.
SEC. 710. One partner may appear for all.
SEC. 711. Distringas.
SEC. 712. Return of *nulla bona*, or *non est inventus*.
SEC. 713. When defendant is abroad.
SEC. 714. Separate property of one cannot be distrained to compel appearance of the other.
SEC. 715. As to bailable process.
SEC. 716. Full name of defendant shall be given.
SEC. 717. Must be jointly declared against.
SEC. 718. In case of tort.
SEC. 719. Action on bail bond.
SEC. 720. Of parties to action on contract.
SEC. 721. Non-joinder must be plead.
SEC. 722. Separate contract may be declared on, and joint contract proved when.
SEC. 723. When non-joinder may be availed of, although not plead.
SEC. 724. Non-joinder of dormant partner.
SEC. 725. Of infant partner.
SEC. 726. Of bankrupt partner.
SEC. 727. When one is dead.
SEC. 728. Outlawry of one.
SEC. 729. When too many are joined.
SEC. 730. Of parties to action for torts.
SEC. 731. Of parties to actions *ex quasi contractu*.
SEC. 732. Other actions *ex quasi contractu*.
SEC. 733. All partners must be sued.
SEC. 734. Actions against survivor.
SEC. 735. Should be declared against, as survivor.
SEC. 736. Outlawry
SEC. 737. Non-joinder, matter of abatement only.

Of the process.

SEC. 708. All personal actions in the superior courts of law must now be commenced by writ of summons.[1]

[1] Stat. 1 & 2 Vict., c. 110, s. 2. But see some special exceptions mentioned in Arch. Pr., Book I, Chap. 1, edit. Chitty.

The ordinary process by which this writ is followed is simply that which is necessary to compel an appearance, or serviceable process, but it may also be the foundation, in certain cases, of bailable process.

First, of process to compel an appearance.

The form of the writ of summons is contained in the statute 2 Will. 4, c. 39, and requires the defendant, within eight days of service of it, to enter an appearance, or, on default thereof, to take notice that the plaintiff may cause an appearance to be entered for him, and proceed to judgment and execution. The words used in the form of the writ, as prescribed by the Act of Parliament, are, "may cause an appearance to be entered for you;" and the word "you," in the case of several defendants, has been held equivalent to "you and each of you."[1]

Personal service should be had.

SEC. 709. It seems that each of the defendants should be served personally with a copy of this writ.[2] But it may be remarked, that before the Uniformity of Process Act,[3] a writ of *venire facias ad respondendum* served on one of several partners at the counting-house of the firm, with copies left for the absent partners, as service on them, was held to be a sufficient service,[4] though a *venire* issued against one of several partners who was abroad for a separate debt, could not be served at the counting-house of the partnership.[5]

If the defendant, or in case of several defendants, if all of them be not served with the copy of the writ of summons within four calendar months from the day of the date of it, the plaintiff may continue the writ by and sue out an *alias* writ of summons, and after that a *pluries*, as the case may require, until the defendant or all the defendants be served.[6]

One partner may enter appearance for all.

SEC. 710. It has been said that if an action be brought against several partners, one may enter an appearance for the rest, which may, in its consequences, lead to judgment against all.[7] But one partner cannot be compelled to enter an appearance, or, where the process is

[1] Englehart v. Eyre, 2 Dowl. Pr. C. 145.
[2] Arch. Pr., vol. 1, p. 117; Tidd's Pr. 169.
[3] 2 Will. 4, c. 39.
[4] Dwerryhouse v. Graham, 3 Price, 266.
[5] Petty v. Smith, 2 You. & Jer. 111.
[5] Archb. 114; Christie v. Walker, 8 Moore, 33.
[7] Per Dampier, arg. Harrison v. Jackson, 7 T. R. 207.

bailable, to give bail for his copartners. Therefore, if any of the copartners, though resident in England, either abscond, or for other reasons cannot be made to appear to the writ of summons, the plaintiff must issue a writ of *distringas* against them.

Distringas.

SEC. 711. The writ of *distringas* is authorized by the stat. 2 Will. 4, c. 39, by which it is enacted that in case it shall be made to appear by affidavit, to the satisfaction of the court out of which the process issued, or in vacation of any judge of any of the Superior Courts, that any defendant has not been personally served with the writ of summons, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do without some more efficacious process, then it shall be lawful for such court or judge to order a writ of *distringas* to be issued, directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, or to the sheriff of any other county, or to any other officer to be named by such court or judge, in order to compel the appearance of such defendant. The act then, after providing for the form of the writ, directs that the writ with the notice attached, or a copy thereof, shall be served on such defendant if he can be met with, or, if not, shall be left at the place where such *distringas* shall be executed, and that a true copy of every such writ and notice shall be delivered together therewith to the sheriff or other officer to whom such writ shall be directed, and that every such writ shall be made returnable on some day in term, not being less than fifteen days after the *teste* thereof, and shall bear *teste* on the day of the issuing thereof, whether in term or in vacation.

A notice is subscribed to this writ stating that in default of the defendant's appearance within eight days after the return of the writ, the plaintiff will cause an appearance to be entered for him and proceed thereon to judgment and execution; but if it is the plaintiff's intention to proceed to outlawry, the notice specifies that in default of appearance before mentioned, the plaintiff will cause proceedings to be taken to outlaw the defendant.

The act which has been referred to,[1] further provides that if the writ of *distringas* shall be returned *non est inventus* and *nulla bona*, and the party suing out such writ shall not intend to proceed to outlawry or waiver, according to the authority thereinafter given, and

[1] Sect. 3.

any defendant, against whom such writ of *distringas* issued, shall not appear at or within eight days inclusive after the return thereof, and it shall be made to appear by affidavit to the satisfaction of the court or judge that due and proper means were taken and used to serve and execute such writ of *distringas*, it shall be lawful for such court or judge to authorize the party suing out such writ to enter an appearance for such defendant, and to proceed thereon to judgment and execution.

Return of nulla bona or non est inventus.

SEC. 712. It is further enacted,[1] that upon the return of *non est inventus* and *nulla bona*, as to any defendant against whom such writ of *distringas* as hereinbefore mentioned shall have issued, whether such *distringas* shall have issued against such defendant only, or against such defendant and any other person or persons, it shall be lawful to proceed to outlaw or waive such defendant by writs of *exigi facias* and proclamation, and otherwise in such and the same manner as might, at the time of passing the statute, be lawfully done upon the return of *non est inventus* to a *pluries* writ of *capias ad respondendum*, issued after an original writ: Provided that every such writ of *exigent* proclamation, and other writ, subsequent to the writ of *distringas*, shall be made returnable on a day certain in term, etc.

It appears, therefore, from this act, that the *distringas* issues for one or two purposes, either to compel an immediate appearance, or to compel an appearance, by a more circuitous mode, namely, by process of outlawry,[2] and the notice affixed to the writ should state which of these proceedings the plaintiff means to take; for an order for the *distringas* will not be granted in the alternative, to compel an appearance or to proceed to outlawry.[3]

When defendant is abroad.

SEC. 713. If a defendant be abroad, it has been held to be nugatory to issue a common *distringas*, to compel his appearance, and, therefore, in such case, outlawry will be the only process.[4] Therefore, in an action against partners, where one partner is abroad, and the others refuse to enter an appearance for him, and the plaintiff is desirous to compel his appearance, he should issue a *distringas*, with

[1] Sect. 5.

[2] See per Lord Alvanley, Morley v. Strombom, 3 Bos. & Pull. 254.

[3] Fraser v. Case, 9 Bing. 464, 2 Moore & Scott, 720.

[4] Sampson v. Lord Graves, 2 Dowl. Pr. C. 10; Partridge v. Wallbank, 2 Mees. & Wels. 893.

a view to his outlawry, and if the sheriff return *non est inventus* and *nulla bona* as to him, the plaintiff may proceed in the outlawry, and, indeed, must do so; for it seems that till the outlawry is completed, he cannot pursue his action.[1] But unless the plaintiff is desirous to compel the appearance of the partner resident abroad, it should seem that he may proceed solely against those who are resident in England. For by the stat. 3 & 4 Will. 4, c. 42, s. 8, the defendant to an action cannot plead the non-joinder of a co-defendant in abatement, unless it is stated in the plea that the defendant whose name is omitted is resident within the jurisdiction, and an affidavit be filed verifying the plea, and stating with convenient certainty the place of residence.

If the defendant is not abroad, although not forthcoming, a *distringas* for outlawry will not be allowed.[2]

Separate property of one cannot be distrained to compel appearance of the other.

SEC. 714. The separate property of one partner cannot be distrained to compel the appearance of the other. And where an action had been commenced against two partners, one of whom resided abroad, and the other, who was resident here, appeared for himself only, the Court of Common Pleas set aside a *distringas* and subsequent proceedings thereon against the latter defendant, and ordered the issues levied upon his separate property to be restored.

As to bailable process.

SEC. 715. As to bailable process, it has been already stated that all personal actions must now be commenced by a writ of summons. The writ of *capias*, therefore, as a means of commencing the action, is now abolished,[3] and no person can be arrested on mesne process in any inferior court, or in any superior court, except in the manner provided for by the 3rd section of the stat. 1 & 2 Vict., c. 110. By that enactment, however, a new writ of *capias* is provided under certain circumstances, and by virtue of such writ the defendant may be arrested and held to bail, at any time after the commencement of the suit, and before final judgment.[4]

The 3rd section of the stat. 1 & 2 Vict., c. 110, enacts that if a plaintiff in any action in any of Her Majesty's Superior Courts of law at Westminster, in which the defendant is now liable to arrest,

[1] 1 Tidd's Prac. 424; Sheppard v. Baillie, 6 T. R. 327.

[2] Fraser v. Case, 9 Bing. 464.

[3] Except in cases under the 85th section of the stat. 1 & 2 Vict., c. 110. See Chit. Archb., vol. 1, p. 461.

[4] Sect. 5.

whether upon the order of a judge, or without such order,[1] shall, by the affidavit of himself, or of some other person, show to the satisfaction of a judge of one of the said Superior Courts that such plaintiff has a cause of action against the defendant or defendants to the amount of 20*l.*, or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant or any one or more of the defendants is or are about to quit England unless he or they be forthwith apprehended, it shall be lawful for such judge, by a special order, to direct that such defendant or defendants so about to quit England, shall be held to bail for such sum as such judge shall think fit, not exceeding the amount of the debt or damages, and thereupon it shall be lawful for such plaintiff within the time which shall be expressed in such order, but not afterward, to sue out one or more writ or writs of *capias* into one or more different counties, as the case may require, against any such defendant so directed to be held to bail, which writ of *capias* shall be in the form contained in the schedule to this act annexed, and shall bear date on the day on which the same shall be issued.

And the 4th section enacts that the sheriff or other officer to whom any such writ of *capias* shall be directed shall, within one calendar month after the date thereof, including the day of such date, but not afterward, proceed to arrest the defendant thereupon, and such defendant, when so arrested, shall remain in custody until he shall have given a bail bond to the sheriff or shall have made a deposit of the sum indorsed on such writ of *capias*, together with 10*l.* for costs, according to the present practice of the said Superior Courts, and all subsequent proceedings as to the putting in and perfecting special bail, or of making deposit and payment of money into court instead of putting in and perfecting special bail, shall be according to the like practice of the said Superior Courts, or as near thereto as the circumstances of the case will admit.

It would be foreign to the object of this treatise to enter minutely into the various points of practice which bear upon the subject now adverted to; but it may be remarked that many of the decisions in

[1] As to the cause of action for which an arrest is allow in general, see Tidd's Prac., c. 10. Before the stat. 1 Vict. 110, where there was a certain debt to the amount of 20*l.*, or damages to that amount, which might be reduced to a certainty, as an *assumpsit* or covenant for the payment of money, the defendant might be arrested as a matter of course, on an affidavit shortly stating the cause of action. Tidd, 171; 3 Black. Com. 292. But where the damages were uncertain, as in *assumpsit* or covenant to indemnify, etc., or in actions for a *tort* or trespass, trover or detinue, there could be no arrest without a special order of the court or a judge. Id.

reference to bailable process before the statute of 1 Vict., c. 110, will still be applicable to cases arising under that statute. The following observations are, therefore, made on this hypothesis:

The affidavit of debt on which the process is founded should correspond with the declaration, both in the statement of the number of plaintiffs and defendants, and of the nature of the debt.[1] Where one of three defendants was held to bail on an affidavit of a debt due from the three defendants as surviving partners of G, and the declaration was for a debt due from the three defendants in their own right, without saying that they were the surviving partners of G, the rule for entering an *exoneretur* on the bail-piece was made absolute, though the court refused to set aside the proceedings for irregularity.

It will be perceived that the judge's order to hold to bail may be made against as many of the defendants as he thinks fit, but there is nothing in the form of the writ of *capias* to show that the defendants who are not to be arrested are to be mentioned in it. It is suggested, however, by the writer of an excellent work on Practice, that it is safer to mention them for the purpose of identifying the bailable proceedings with those in the action, and to prevent the discharge of bail by a variance in the description of the action in which they become bound for the defendant.[4]

Full name of defendant should be given.

SEC. 716. The Christian name of the defendant ought generally to be stated in the writ,[5] otherwise the proceedings may, on motion, be set aside for irregularity. But in actions on bills of exchange and other written instruments, the initials of the Christian names of the parties may be used in all the proceedings if the initials are used in the instruments themselves.[6] So also, in some cases it is sufficient to show that due diligence has been used to obtain the true name of the defendant.[7] And a misnomer may be cured by altering the writ and getting it resealed before the return, and where process is sued out against four defendants, one of whom is misnamed, it may be served upon the three whose names are right, and if the name of the other

[1] Turner v. Portall, 2 N. R. 281; Forbes v. Phillips, id. 98.

[2] Ch. Arch., vol. 1, p. 495. Affidavit to hold to bail for money lent by the plaintiff and his late copartners, C and D, held insufficient, inasmuch as it did not state that they were dead. Morrall v. Parker, 3 Mees. & Wels. 65.

[3] Spalding v. Mure, 6 T. R. 363.

[4] 1 Arch. Pr. 514, edit. Chitty.

[5] ——— v. Snow, 1 Chit. 398; Tomlin v. Preston, id.; Taylor v. Rutherman, 6 Moore, 264; Lake v. Silk, 3 Bing. 296.

[6] Stat. 3 & 4 Will. 4, c. 42, s. 12.

[7] Reg. Gen. H. T., 2 Will. 4, r. 33.

be afterward altered and the writ resealed, it is good against all.[1] Moreover, the defendants themselves may, by their own acts, waive the irregularity arising from the omission of their Christian names in the writ, as, for instance, by afterward signing a regular bail bond.[2]

Must be jointly declared against.

SEC. 717. In cases of contract, if the plaintiff hold two defendants to bail on a joint writ, and declare against them severally, the court will set aside the declaration and subsequent proceedings for irregularity.[3] But it has been held that in non-bailable process on writ against two, a declaration against one only is good.[4]

In case of tort.

SEC. 718. In *tort*, a party suing out bailable process jointly against several, may separately declare against one of them,[5] provided he drops his proceedings altogether against the others.[6]

Where the process is bailable, and all are arrested under it, if the defendants do not appear according to the exigency of the writ, after bail to the sheriff has been given, the plaintiff may either take an assignment of the bail bond, and proceed thereon against the defendants and their bail to the sheriff, or he may proceed against the sheriff himself, to compel him to return the writ, and bring the bodies of the defendants.[7] If the bail below be sufficient, it is usual for the plaintiff to take an assignment of the bail bond.[8]

Action on bail bond.

SEC. 719. In an action on the bail bond by the assignee, the declaration must show clearly the assignee's title to sue; it must, therefore, state the writ in the original action, the arrest, the bail bond with the condition to appear, the breach of condition, and the assignment to the plaintiff.[9] The writ, in the original action, should be stated accurately; but it seems that a variance between the actual writ and that stated in the declaration will not be fatal, if either are sufficient to warrant the arrest.[10]

---

[1] Anon., 1 Chit. 398.

[2] Kingston v. Llewellyn, 1 Brod. & Bing. 529; 4 Moore, 317.

[3] Tidd's Prac. 149; Chapman v. Eland, 2 N. R. 82; Woodcock v. Kilby, 1 M. & W. 41; Bellotti v. Barella, 4 Dowl. Pr. C. 719.

[4] Evans v. Whitehead, 2 Man. & Ryl. 367. At least, this distinction existed before the late statutes. Whether it still exists may not be quite certain.

[5] Wilson v. Edwards, 3 Barn. & Cres. 734; 5 Dowl. & Ryl. 622.

[6] Caldwell v Blake, 3 Dowl. Pr. C. 656.

[7] Tidd's Prac. 297.

[8] Id.

[9] See "Forms," 2 Chit. 452, etc.

[10] Hendray v. Spencer, 1 T. R. 238.

Of the parties to actions ex contractu.

SEC. 720. In an action brought against a partnership firm, on a partnership contract, not in writing, all those who were partners at the time of the contract ought to be joined as defendants.[1] For a contract, when made with partners, is originally a joint contract, though it may be separate, as to its effects, and a creditor, being party to the contract, is bound both by law and conscience to do all that is necessary to effectuate the contract.[2]

---

[1] Bristow v. James, 7 T. R. 257; Byers v. Dobie, 1 H. Bl. 236; Ditchburn v. Spracklin, 5 Esp. 81. Notwithstanding agreement between partners to the contrary. Lodge v. Dicas, 3 Barn. & Ald. 611.

[2] Per De Grey, C. J., Abbott v. Smith, 2 W. Bl. 947.

Actions against the firm — Generally. — The question, who ought to be sued in respect of a breach of contract committed by a firm, or some or one of its members? turns principally on the question, upon whom is that contract legally binding? This question has been already discussed at length, and it is needless to repeat what has there been said. Assuming, therefore, the question of liability to be determined, it remains only to consider whether all the persons who are liable must be sued jointly, or whether any and which of them may be sued without the others. With reference to this question, it is necessary to premise that even where all the members of a firm are liable, and where all ought to be sued, still, if some of them only are sued, the non-joinder of the others can only be taken advantage of by plea in abatement. See the note to Cabell v. Vaughan, 1 Wm. Saund. 291 b; and Rice v. Shute, 5 Burr. 2611; and 1 Smith's L. C. 287; Hawkins v. Ramsbottom, 6 Taunt. 179; Abbot v. Smith, 2 W. Blacks. 947. When, therefore, in the following observations it is said that all the partners ought to be, or must be sued, what is meant is, that if they are not, their non-joinder can be made the subject of a dilatory plea. The defendant must state in his plea who ought to be joined with him, and must, if required, give the addresses of the persons named. See Taylor v. Harris, 4 B. & Ald. 93; Newton v. Verbeke, 1 Y. & J. 257. But it is not meant that their omission will be fatal to the plaintiff if the action proceeds to trial without any such plea being pleaded. It is not easy to see the reason why, if some only of several persons, jointly entitled, sue, it should be fatal to the action; whilst if some only of several persons jointly obliged are sued, it is of no consequence, unless the non-joinder is pleaded in abatement. It is indeed urged that a person who is bound jointly with others cannot say that he is not bound at all, Whelpdale's case, 5 Co. 119 a; but surely he can truly say that he is not bound in the manner and form alleged; and this is precisely the objection which is so fatal in an action by some only or several persons jointly entitled. However, the distinction was firmly settled in Rice v. Shute, and has been acted on ever since, although the power of amendment conferred by modern statutes has rendered it of less importance than formerly. But when it is said that some or one only ought to be sued or must be sued, or that some or one ought not to be or must not be sued, a different meaning is intended to be conveyed; for an action *ex contractu* brought against too many persons, and failing as to one of them, fails as to all. See Weal v. King, 12 East, 452; Max v. Roberts, 2 Bos. & P. N. R. 454; Robeson v. Gunderton, 9 C. & P. 476; Mulford v. Griffin, 1 Fos. & Fin. 145. And this rule applies, notwithstanding recent improvements in the law, unless the name of the defendant as to whom the action fails can be struck out, by virtue of the authority to amend conferred by the Common Law Procedure Acts. See Mulford v. Griffin, 1 Fos. & Fin. 145.

Actions ex contractu. — Passing now to the question, who ought to be sued in respect of contracts entered into by or on behalf of a firm? and assuming the question of liability to have been determined upon the principles before laid down, it may be stated as a general rule that all who are jointly liable must be sued jointly; see the note to Cabell v. Vaughan, 1 Wms. Saund. 291 b; Byers v. Dobey, 1 H. Blacks. 236; Bonfield v.

So, also, in an action against partners on a joint bond, or joint covenant, or other instrument in writing, although they alone can be sued who are parties to the instrument,[1] yet all the co-obligors or co-covenantors should be made defendants.[2]

Smith, 12 M. & W. 405; even though some of them may be abroad. Sheppard v. Baillie, 6 T. R. 327. This rule applies to actions against partners for the recovery of penalties imposed upon them by statute; Bristowe v. James, 7 T. R. 257; and to actions in form *ex delicto*, but founded in substance on a breach of contract express or implied; Powell v. Layton, 2 Bos. & P. N. R. 365; Buddle v. Wilson, 6 T. R. 369; but it is subject to certain real or apparent exceptions which require notice. In the first place an infant partner, not being bound by any contract entered into by or on behalf of the firm, ought not to be joined as a defendant in an action on any such contract; if his non-joinder is pleaded in abatement, infancy should be replied. See 1 Wms. Saund. 207, a; Chandler v. Danks, 3 Esp. 76; Burgess v. Merrill, 4 Taunt. 468; Jaffray v. Trebain, 5 Esp. 47. Formerly it was thought that an infant partner ought to be made a co-defendant. See Ex parte Henderson, 4 Ves. 164; Gibbs v. Merrill, 3 Taunt. 307. Secondly, as regards dormant partners. It has been seen that they are liable on all contracts entered into on behalf of the firm to which they belong, and whether such a contract is written or unwritten, express or implied, it is clear that a dormant partner may be sued upon it. Robinson v. Wilkinson, 3 Price, 538; Beckham v. Drake, 9 M. & W. 79, overruling Beckham v. Knight, 4 Bing. N. C. 234. Of course if a person is sued on the ground that he is a dormant partner, that fact must be proved, for otherwise no case will be made against him. See Hall v. Bainbridge, 8 Dowl. 583. By the general rule, therefore, which requires that all liable to be sued shall be sued, dormant partners ought always to be made co-defendants in an action on a contract binding the firm. And this is the law, subject, however, to the qualification, that a person who holds himself out to another as the only person with whom that other is dealing, cannot be allowed afterward to say that such other was also dealing with somebody else. The leading cases on this subject are Dubois v. Ludert, De Mautort v. Saunders, and Bonfield v. Smith. In Dubois v. Ludert, 5 Taunt. 609, Ludert was employed by one Schroeder to sell goods on commission, and was sued by his assignees for the proceeds of the sale of the goods. Schroeder had become indebted to one Groning in respect of some other business, and Ludert and Groning were partners, each being a dormant partner as regarded the business carried on by the other. Ludert, in order to set off in the action brought against him the debt due from Schroeder to Groning and Ludert, pleaded in abatement the non-joinder of Groning as a co-defendant. The plea was allowed; the court expressing their opinion to be that if a man enters into a contract with one person, not knowing that he has a partner, and makes his contract with that person alone, it is competent for that person, if sued, to plead in abatement that he has other partners who are not joined, unless the plaintiff is thereby substantially injured. In De Mautort v. Saunders, 1 B. & Ad. 398, a bill of exchange was drawn on and accepted by Saunders Brothers & Co., London. The firm, Saunders Brothers & Co., consisted of two brothers, resident in London (the defendants), and of two other persons resident abroad, and not generally known to belong to the firm. The defendants pleaded in abatement the non-joinder of their two copartners, and the case of Dubois v. Ludert was relied upon. But it was left to the jury to say whether the holder of the bill might not reasonably suppose that the defendants alone constituted the firm, and that if he had reasonable ground so to think, he must be taken to have contracted with them alone, and to be entitled to a verdict. The jury having found for the plaintiff, the court held that the question had been properly submitted to the jury, and that Dubois v. Ludert could not be supported. In Bon-

[1] Shack v. Anthony, 1 M. & S. 574. Per Lord Tenterden, Lefevre v. Boyle, 3 B. & Ad. 877; Beckham v. Knight, 4 Bing. N. C. 243.

[2] Horner v. Moore, 5 Burr. 2611; Vernon v. Jeffries, 2 Str. 1146.

Non-joinder must be plead in abatement.

SEC. 721. The omission of a party as co-defendant in these cases is not ground of nonsuit, and can only be taken advantage of by plea in abatement, verified by affidavit, unless it appear on the face of the

---

field v. Smith, 12 M. & W. 405, the defendant and his brother were partners, and carried on business under the firm of Bush & Co., but the defendant was the only person known to the plaintiff as constituting the firm. The plaintiff having sued the defendant for goods sold and delivered, the defendant pleaded in abatement the non-joinder of his brother. The jury were directed that a partnership between the defendant and his brother was proved, but that if the defendant gave the plaintiff reason to believe that he alone constituted the firm of Bush & Co., he would be solely liable. The jury found for the defendant. A new trial was moved for on the ground that the real question, as stated in De Mautort v. Saunders, was whether the plaintiff had reasonable ground to consider the defendant as Bush & Co., but the court held that, unless the plaintiff's belief was founded on the defendant's conduct or representations, the defendant had a right to insist on his partner being sued in the action, and a new trial was refused. In Dubois v. Ludert, the defendant carried on business in his own name, and there was no reason to suppose that he had a partner, but in each of the other two cases the defendants carried on business under a partnership style, Saunders Brothers & Co., and Bush & Co., and there was, therefore, at all events, reason to suppose that they had partners, it then became a question for the jury, whether the defendants had done any thing to lead the plaintiff to suppose they had not; in De Mautort v. Saunders, it was found that they had (so in Stansfield v. Levy, 3 Stark. 8), whilst in Bonfield v. Smith it was found that they had not. It follows from the last-mentioned cases that, notwithstanding Dubois v. Ludert, if a person carries on business in his own name, and incurs debts in so doing, he may be sued alone for such debts, and that he cannot successfully plead in abatement the non-joinder of a dormant partner. See, too, Mullett v. Hook, Moo. & Mal. 88; Baldney v. Ritchie, 1 Stark. 338; Doo v. Chippenden, Abbott on Shipping, 84; Colson v. Selby, 1 Esp. 452. The same rule holds whenever a partner enters into a written contract in which he does not disclose the fact that he is acting for other people, for although they may be sued, he cannot insist that they shall be sued. See Higgins v. Senior, 8 M. & W. 834, where the plaintiff knew the defendant was acting as agent. Thirdly, to the general rule that all persons jointly liable on a contract must be sued jointly, there are a few statutory exceptions. Thus, by the Carriers Act, a person sued a common carrier, and not on any special agreement, cannot plead in abatement the non-joinder of other persons who may be his partners, 11 Geo. IV. & 1 Will. IV., c. 68, ss. 5, 6, and by the Joint Stock Companies Act, 1857, if a partnership required to be registered is not registered, any member may be sued alone in respect of the debts or engagements of the firm, and he cannot plead in abatement that his copartners ought to be sued with him. 20 & 21 Vict., c. 14, s. 3. With respect to joint and several contracts, it is a rule as old as any in the law that on a contract binding several persons jointly and severally, each or any of them may be sued separately, or all of them may be sued together, but that an action against more than one and less than all is improper in point of form, and may be met by a plea in abatement. See the note to Cabell v. Vaughan, 1 Wms. Saund. 291 g; 1 Chitty on Plead. 50, and as to staying one action when the creditor has been satisfied in another, see Carne v. Legh, 6 B. & C. 124; Nesbitt v. Howe, 8 Ir. Law Rep. 273. The previous remarks have been addressed to the case of actions on contracts binding the firm. But a contract may be entered into by a partner and not bind the firm, either because it was not entered into on behalf of the firm, or because if it was, the partner entering into it exceeded his authority expressed and implied. In such cases the partner contracting and no one else ought to be sued. If he contracted as a principal, he ought to be sued on the contract; whilst, if he contracted as an agent, he ought to be sued for having done so without authority. See Jenkins v. Hutchinson, 13 Q. B. 744; Lewis v. Nicholson, 18 id. 503; Randell v. Trimen, 18 C. B. 786; Collen v. Wright, 7 E. & B. 301, and 8 id. 647. If a partner enters into a contract on behalf of the firm, but exceeds his authority, and the contract does not bind the firm, and the

declaration, or *some other pleading of the plaintiff*, that the party omitted jointly contracted and is still living, and also, as it is conceived, is resident within the jurisdiction,[1] in which case the defend-

firm repudiates it, the partner contracting, and not the firm, ought to be sued for money paid to him under it, and sought to be recovered back. See Hudson v. Robinson, 4 M. & S. 475. The rules which require all the members of a firm to join as plaintiffs in an action *ex contractu* brought by them, and to be joined as defendants in an action *ex contractu* brought against them, lead occasionally to most inconvenient results. Supposing a partner to be indebted to his own firm, the firm cannot bring an action against him as if he were a stranger, because he must by virtue of the rules in question appear as a plaintiff on the record, and he cannot sue himself. See Mainwaring v. Newman, 2 Bos. & P. 120; Moffat v. Van Millengen, id. 124. The same reasoning precludes a person from bringing an action against a firm of which he is a member. Nor does the inconvenience stop here, for if there are two totally distinct firms, having one common partner, neither of these firms can bring an action on contract against the other. Bosanquet v. Wray, 6 Taunt. 598; 1 Wms Saund. 291, *h*. See as to the non-application of this principle to companies, Bosanquet v. Woodford, 5 Q.B. 310. As to estimating damages sustained by one firm by reason of being prevented from completing a contract made with another firm, some members being common to both, see Waters v. Towers, 8 Ex. 401. In the case of negotiable instruments, this inconvenience is, it is true, often avoided by taking care so to indorse them that the person suing on them is not amongst those sued; but in the case of ordinary contracts this cannot be done, and the consequence is that an action will not lie.

Actions ex delicto.—It is not every tort which, though committed by several persons acting together, is legally imputable to them all jointly. See 2 Wms. Saund. 117, *b* and *c*; 1 Chitty's Plead. 96, 97; but supposing a tort to be imputable to a firm, an action in respect of it may be brought against all or any of the partners. If some of them only are sued they cannot insist upon the other partners being joined as defendants, Sutton v. Clarke, 6 Taunt. 29, and this rule applies even where the tort in question is committed by an agent or servant of the firm, and not otherwise by the firm itself. Therefore an action may be sustained against any one or more of the partners for the recovery of damages for an injury arising from the carelessness of a servant of a firm, and the partners sued cannot plead in abatement the non-joinder of the other partners. Mitchell v. Tarbutt, 5 T. R. 649; Ansell v. Waterhouse, 6 M. & S. 385. But there is a distinction between ordinary actions of tort and those which are brought against persons in respect of their common interest in land; for, if one only of several joint tenants or tenants in common is sued for any injury arising from the state of their land, the non-joinder of the other cotenants may be pleaded in abatement, 1 Wms. Saund. 291, *f* and *g*, and Mitchell v. Tarbutt, 5 T. R. 649, and this rule applies to partners as well as to persons who are not partners.

Actions by and against partners where a change in the firm has occurred. — In the preceding remarks upon the persons who ought to sue and be sued when a right is sought to be enforced by or against a firm, it has been assumed that no change in the members of the firm has occurred between the period when the right in question accrued and the time when the action to enforce it is brought. It is proposed in the next place to consider to what extent the rules above established require modification, when some such change has taken place by reason either of the introduction of a new partner, or of the retirement, death, or bankruptcy of an old one. First, with respect to changes caused by the introduction of new part-

[1] In 1 Saund. 291 c, note 4, it is stated, as a general principle, that unless those facts which are absolutely necessary to be averred by the defendant in his plea be admitted by the plaintiff in his declaration or other pleading, the action cannot, in the case abovementioned, be abated. If so, it ought to appear in the declaration, not only that the co-defendant is living, but that he is within the jurisdiction. See 2 & 3 Will. 4, c. 42, s. 8.

ant may demur, or move in arrest of judgment, or sustain a writ of error.[1] If, except under the circumstances just mentioned, the defendant does not plead the non-joinder in abatement, it is a waiver

ners and the retirement of old ones. As, by the law of this country, the right to sue, or obligations to be sued in respect of a contract, cannot, as a general rule, be so assigned as to enable the assignee to sue or be sued in his own name, it follows that if, after a contract is entered into with a firm, a new partner is introduced, no action upon that contract can be brought either by or against him. *Ex hypothesi*, he is not a party to the contract sued upon, there is no agreement with him of which he can avail himself, except through the medium of other people, and there is no agreement by him by virtue of which he has incurred any liability to the person supposed to be suing him. See accordingly Wilsford v. Wood, 1 Esp. 182; Ord v. Portal, 3 Camp. 239, note; Waters v. Paynter, Chitty on Bills, 406, note 5, ed. 10; Vere v. Ashby, 10 B. & C. 288; Young v. Hunter, 4 Taunt. 582. As regards negotiable instruments, indeed, any persons who can agree to sue jointly upon them may do so, provided the instrument is in such a state as to pass by delivery, therefore, if a bill or note indorsed in blank is given to a firm consisting of certain individuals, who afterward take in a new partner, they and he, or some or one of them, may sue on that bill or note, see Ord v. Portal, 3 Camp. 239; but as to other contracts the rule above laid down invariably prevails, even though the partners may have agreed amongst themselves that all debts owing to or by the old firm shall be taken and paid by the new firm, Wilsford v. Wood, 1 Esp. 182; for no agreement between partners as to which of them shall sue or be sued in respect of debts owing to or by the firm, is of any avail as between them and non-partners. See Radenhurst v. Bates, 3 Bing. 463. So, as regards changes occasioned by the retirement of a partner. It has been already shown, at considerable length, that the retirement of a partner in no way affects his rights or obligations to strangers in respect of past transactions. Notwithstanding his retirement, therefore, he must join as a plaintiff, and be joined as a defendant, in every action to which, had he not retired, he would have been a necessary party. This rule holds good even where a contract is entered into before and the breach of it occurs after the retirement of a partner. See Dobbin v. Foster, 1 Car. & K. 823. In one case, indeed, it was held at Nisi Prius that where two partners sold goods, and they afterward dissolved partnership, an action for the price of those goods was sustainable by the one partner who continued to carry on the business of the late firm, Atkinson v. Laing, Dowl. & Ry. N. P. Ca. 16; but the propriety of this decision is more than questionable. Sometimes one partner retires and a new partner comes in and an agent of the firm, in ignorance of the change that has occurred, enters into a contract on behalf of the old firm; in such a case it seems that the members of the new firm may adopt a contract and sue on it, unless the defendant is prejudiced by their so doing. Mitchell v. Lapage, Holt's N. P. Ca. 253, but see Boulton v. Jones, 2 H. & N. 564. Although a change in a firm, whether by the introduction of a new partner or the retirement of an old one, cannot confer upon the partners any new right of action against strangers, or *vice versa*, as regards what may have occurred before the change took place, it may, nevertheless, operate so as to discharge a person from a contract previously entered into by him. Thus, as was pointed out in the seventh chapter of the first book, a person who is surety to a firm is discharged from his suretyship by a change amongst its members, and cannot, therefore, be sued either by the old or by the new partners for any default of the principal debtor occurring subsequently to the change. Again, if a person enters into a contract with a firm, and that contract is of a purely personal character, to be performed by the individuals who have entered into it, and not by any one else, a change in the firm may operate as a dissolution of the contract, so that neither the new nor the old partners can sue in respect of an alleged breach which may have occurred since the change took place. An illustration of this is afforded by Robson v. Drummond, 2 B. & Ad. 303.

[1] 1 Chit. Pl. 32.

of the objection. For he ought not, as Lord Mansfield observed, to be permitted to lie by and put the defendant to the delay and expense of a trial, and then set up a plea not founded in the merits of the

In that case A and B were partners as coachmakers. C, who knew nothing of B, entered into a contract with A for the hire of a carriage for five years, at so much a year, and A undertook to keep the carriage in proper order for the whole five years. Before the five years were out A and B dissolved partnership, and A assigned the carriage and the benefit of the contract relating to it to B. B gave C notice of the dissolution and arrangement respecting the carriage, but C declined to continue the contract with B, and returned the carriage. An action was then brought by A and B against C, for not performing the contract; but it was held that the action would not lie, the contract having been with A alone, to be performed by him personally, and he having disabled himself from continuing to perform it on his part. In the recent case of Stevens v. Benning, 1 K. & J. 168, and 6 De G. Mc. & G. 223, the same principle was applied to a contract between an author and a firm of publishers, and it was held that the contract was one of a personal character, and that consequently the author was discharged from it by a change in the firm, and an assignment of the benefit of the contract to persons of whom the author knew nothing.

Changes caused by death.—With respect to changes caused by death, the maxim, *jus accrescendi inter mercatores locum non habet*, the real meaning of which will be explained hereafter, has no application to rights of action. If, therefore, a partner dies in the life-time of any one or more of his copartners, all actions brought in respect of any contract entered into by or on behalf of the firm before his death, must be brought by or against the surviving members of the firm, and by or against them alone; for the representatives of the deceased partner can neither sue nor be sued at law in respect of any such contract. Dixon v. Hammond, 2 B. & Ald. 310, which shows that an agent of the firm must account to the surviving partners See, too, Martin v. Crompe, 1 Ld. Raym. 340, and 2 Salk. 444; and Webber v. Tyvill, 2 Wms. Saund. 121 e. So an action for the conversion of partnership goods must be brought by the surviving partners; Kemp v. Andrews, Carth. 170; but see Buckley v. Barber, 6 Ex. 164; although an indictment for stealing them may be preferred by the surviving partners, and the next of kin of the deceased partner. R. v. Gaby, Russ. & Ry. 178; R. v. Scott, id. 13.

Surviving partners.—It follows from the above rule that the last surviving partner, or if he is dead, his legal personal representative, is the proper person to sue or be sued at law in respect of the debts and engagements of the firm. Richards v. Heather, 1 B. & Ald. 29; Calder v. Rutherford, 3 Brod. & Bing. 302. In declaring against a surviving partner it is not necessary that he should be described as such; Richards v. Heather, 1 B. & Ald. 29; Mountstephen v. Brooke, id. 224. The earlier authorities are not uniform. See Hyat v. Hare, Comb. 383; Tissard v. Warcup, 2 Mod. 279; Spalding v. Meere, 6 T. R. 363; but in a declaration by a surviving partner the rule is different. Jell v. Douglass, 4 B. & Ald. 374; 2 Wms. Saund. 121 e; Attwood v. Rattenbury, 5 J. B. Moo. 209; and 6 id. 570; Fitzgerald v. Bœhm, 6 id. 332; but see, *contra*, Ditchburn v. Spracklin, 5 Esp. 31. The reason for this is, that in actions against partners one may be sued alone subject to a plea in abatement, which, in the case supposed, cannot be pleaded; whilst in actions by partners all must join, and if there is only one left, that fact should appear, as otherwise there will be a variance between the contract alleged and that proved. It is, however, apprehended that an amendment would not be allowed, if in a declaration by a surviving partner he is not described as such.

Changes caused by bankruptcy.—With respect to changes caused by bankruptcy. If a partner becomes bankrupt, his assignees must join in his stead in any action in which, had no bankruptcy intervened, the bankrupt himself would have been necessarily joined as a plaintiff. Eckhardt v. Wilson, 8 T. R. 140; Thomason v. Frere, 10 East, 418; Graham v. Robertson, 2 T. R. 282. If the assignees decline to join, the solvent partners are entitled to make use of their names upon indem-

case, but on the form of the proceeding.[1] Nor is he entitled even to a plea in abatement, where the contract on which he is sued was entered into in fraud of his copartners.[2]

It seems scarcely necessary to observe that although the plaintiff may sue one of several joint debtors separately, leaving the defendant to plead in abatement, he has no right to sue all the parties separately for one and the same demand.[3]

The necessity of pleading the non-joinder of defendants in abatement seems to have been acknowledged in the case of joint bonds or deeds, from the 28th of Henry 6, down to the present time.[4] The well-known case of Whelpdale,[5] was in accordance with this doctrine. There the plaintiff had declared on a bond made by the defendant, to which the defendant pleaded *non est factum;* the jury found that the bond was a joint bond made by the defendant and another to the plaintiff, and upon this special verdict it was adjudged by the court that the plaintiff should recover, "because when two men are jointly bound in one bond, although neither of them is bound by himself, yet neither of them can say that the bond is not his deed for he has sealed and delivered it, and each of them is bound in the whole. But in this case he might have pleaded in abatement of the writ."

---

nifying them against the costs of the action. Whitehead v. Hughes, 2 Cr. & M. 318. If all the partners are bankrupt, any action which, if bankruptcy had not intervened, it would have been necessary to bring in the name of all the partners, must be brought by their assignees. See Ray v. Davies, 8 Taunt. 134. The assignees of a firm may sue for debts owing to the members thereof individually. Stonehouse v. De Silva, 3 Camp. 399; Hancock v. Haywood, 3 T. R. 433; Scott v. Franklin, 15 East, 428. But this is subject to the qualification that bankrupts, whether partners or not, may sue in their own names as trustees for other people. See Buddington v. Castelli, 1 E. & B. 66; Winch v. Keeley, 1 T. R. 619. As regards actions against a firm, one or more of the members of which have become bankrupt, it need hardly be observed that there is no remedy by action against assignees in respect of liabilities of the bankrupt they represent. The only remedy is by proof against his estate, or by proof and by an action against him if he has not obtained his certificate, or if his certificate is no bar. When, therefore, it is desired to recover a debt due from a firm, and all the partners are bankrupt, an action is not the remedy unless the partners have not obtained their certificates, or unless the debt could not have been proved in bankruptcy. If, however, some only of the partners are bankrupt, the solvent partners may be sued. Hawkins v. Ramsbottom, 6 Taunt. 178. And they may, and should be, sued alone, if the bankrupt partners are discharged from the debt in question, and jointly with them if they are not. It is necessary to join a person as defendant who has been discharged in bankruptcy. Bovill v. Wood, 2 M. & S. 23; Hawkins v. Ramsbottom, *ante;* Moravia v. Glass, 2 M. & S. 444; Lindley on Part., pp. 396–404.

[1] Rice v. Shute, 5 Burr. 2611; 2 W. Bl. 695.

[2] Hudson v. Robinson, 4 Mau. & Sel. 475.

[3] Carne v. Legh, 6 Barn. & Cress. 124; 9 Dowl. & Ryl. 126.

[4] Y. B. 28 Hen. 6, 3 a, pl. 11; Y. B. Mich. 35 Hen. 6, pl. 38; Bro. Briefe, 37.

[5] 5 Rep. 110; see Stead v. Mohun, Cro. Jac. 152; Cabell v. Vaughn, 1 Saund. 299; 2 Keb. 525; Ascue and Hollingsworth's case, Cro. Eliz. 494; Sayer v. Chaytor, Lutw. 595.

The rule of law so applied to joint bonds has, since the case of Rice v. Shute, been extended to all joint contracts, not only to mere parol contracts made with partners, in which case the plaintiff may not know accurately all the parties with whom he dealt, but to written contracts in which the parties who may be sued appear on the face of the paper, and are, therefore, known to the plaintiff. In such case, so long as the plaintiff does not declare jointly, the defect can only be pleaded in abatement, and in default of such plea, the joint contract may be given in evidence of the separate contract declared on. Thus, in Germain v. Frederick,[1] assumpsit was brought against the defendant solely for goods sold to him and delivered on board the Lord Macartney. At the trial, the plaintiff failed in his parol proof, and then produced the following note written by the defendant: "Gravesend, March 29. Twenty carts on board the Lord Macartney, by order of H. Frederick and Capt. Neale." The plaintiff was nonsuited. In support thereof it was said that the declaration stated it to be a contract of the defendant alone, but the proof was of a joint contract. On the other side it was said that the objection was only good if the fact had been pleaded in abatement. The court stopped the argument and made the rule absolute for a new trial, observing that the contract proved was the same as that laid, and the case was precisely that of Rice v. Shute.

So, in Dixon v. Bowman,[2] which was "an action against two defendants on a promissory note made by them jointly and severally, in evidence it appeared that a third person had also signed the note. Aston, J., held this a variance, but the court granted a new trial." So, in Evans v. Lewis,[3] which was an action against the defendant as drawer of a bill of exchange. On non-assumpsit pleaded, it appeared in evidence at the trial that the bill was drawn by the defendant and another jointly. It was objected that there was a difference between the bill proved and the bill declared upon; and the judge inclined to that opinion, but permitted the cause to proceed with liberty for the defendant to move for a new trial. A verdict being found for the plaintiff, a rule was obtained to show cause why it should not be set aside. On showing cause, the court was clearly of opinion that there was no variance between the bill of exchange proved, and that which was declared upon; but the defendant should have pleaded in abatement that another person drew the bill jointly with the defendant

[1] 1 Wms. Saund. 291, c.
[2] Id. 291, d.
[3] Id.; Wilson v. Reddall, Gow. 161.

who is still alive. So, where a declaration against the acceptors of a bill of exchange stated the bill to be drawn upon and accepted by three persons, and it was proved to have been drawn upon and accepted by three jointly with a fourth, it was held that this was no variance.[1]

---

[1] Mountstephen v. Brooke, 1 Barn. & Ald. 224.

Parties.—When a bill or note is made, the only proper parties to a suit upon it are those named in it as drawers, payees or indorsees, as the case may be. Pease v. Hurst, 10 B. & C. 122; McBirney v. Harran, 5 Ir. L. R. 428; Philps v. Lyle, 10 A. & E. 113. The rule would be the same whether they were partners or not, and where the names of two persons appear as payees, in a bill, both should join although one has in fact no interest in the bill. Guidon v. Robson, 2 Camp. 302. But where a bill has been indorsed in blank, any person holding it may sue upon it. Ord v. Portal, 3 Camp. 339; Attwood v. Rattenbury, 6 Moore, 579; Lowe v. Copestake, 8 C. & P. 300; Law v. Parnell, 6 Jur. (N. S.) 172. And it has been held in England that where one partner in his own name accepts a bill drawn on a stranger for his honor, and pays the bill when due out of the partnership funds, with the consent of his partners, the party who accepted the bill is the proper party to sue the drawee for indemnity. Driver v. Burton, 17 Q. B. 989. The general common-law doctrine in reference to common contracts, verbal or written is, that where the contract is joint, all parties to it must be joined in a suit upon it. 1 Wms. Saund. 291; 1 Chit. Pl. 10. But liberal provisions are now made for amendments in such cases by the English statutes, 15 and 16 Vict., c. 76, ss. 34, 35. And similar provisions for amendments may be found in the statutes of most of the states. Mr. Lindley on the subject of parties observes: "The authorities which we have just referred to establish the rule that when an ordinary contract not under seal is entered into with an individual partner, such contract, whether written or verbal, express or implied, may be sued upon at law by him and his copartners if they can show that the contract was really entered into by the individual partner on behalf of the firm. But it does not necessarily follow that because all the partners may sue on such contract they must do so. Whether they must or not depends upon the nature of the contract, and upon whether the firm was in the position of a disclosed or an undisclosed principal. The rules on this subject are as follows:

1. A dormant partner never *need* be joined as a co-plaintiff in an action on a contract entered into with the firm or with one of its members. Leveck v. Shafto, 2 Esp. 468, action for work and labor. See Phelps v. Lyle, 10 A. & E. 113, as to contracts with the "directors" of a company.

2. If a contract is expressly entered into with a firm or with one of its members on its behalf, such contract must be sued upon by all the members composing the firm at the time the contract is entered into. See 1 Wm. Saund. 291 *k*, and 1 Chitty on Pleading, 10–15; Phelps v. Lyle, 10 A. & E. 113; Metcalf v. Bruin, 12 East, 400; Woolmer v. Toby, 4 Ra. Ca. 713, excepting only the then dormant partners, if any.

3. All the members of a firm (except the dormant partners) must join as plaintiffs in an action on an implied contract with the firm, whether the person sued supposed he was dealing with the firm or not. Thus, if the funds of the firm are lent by one partner he cannot alone maintain an action for its repayment by virtue of any implied contract with himself for the promise to repay which is implied by law, is a promise with the real lenders of the money and must be sued upon by them. See Garrett v. Handley, 3 B. & C. 462; Graham v. Robertson, 2 T. R. 282; Teed v. Elworthy, 14 East, 210.

4. Where a written contract is entered into with one partner, and it does not appear on the face of the contract that he was acting on behalf of the firm, he *may* sue alone on that contract. In such cases the action may be maintained *either* in the name of the person with whom alone the contract was ostensibly made, *or* in the name of the parties really interested. See Skinner v. Stocks, 4 B. & Ald. 437, and Cothay v. Fennell, 10 B. & C. 671.

The expression, "members of the firm," as used in the preceding observations, is not intended to include what

Separate contract may be declared on and joint contract proved — When.

SEC. 722. But though, subject to a plea in abatement, a separate contract may be declared on, and a joint one given in evidence, it will be error if a joint contract is set forth in the declaration, and

---

are called *nominal* partners, *i. e.*, persons who are not entitled to share the profits of the firm; but whose names appear and are used as if they were. Such persons never need join as plaintiffs in an action on a contract not expressly made with them. In Kell v. Nainby, 10 B. & C. 20, the plaintiff practiced as an attorney and solicitor under the name of Kell & Son, and he sued in his own name for business done by him for the defendant. It was objected that the son ought to have been a co-plaintiff, but it was proved that the son was only a salaried clerk, and had not been employed by the defendant and it was therefore held that the action was properly brought by the father alone. There are several other cases to the same effect. Barker v. Stubbs, 1 Man. & Gr. 41; Davenport v. Rackstraw, 1 C. & P. 80; Parsons v. Crosby, 5 Esp. 100; Harrison v. Fitzhenry, 8 id. 238; Glossop v. Colman, 1 Stark. 25, and they show that if a partner retires and leaves his name in the firm, it is not necessary that he should be a co-plaintiff in an action brought by the continuing partners in respect of what has happened since the retirement. Cox v. Hubbard, 4 C. B. 317. But *prima facie*, a nominal partner shares profits, and therefore ought *prima facie* to be joined as a co-plaintiff in an action on an express or implied contract with the firm. This is shown by Teed v. Elworthy, 14 East, 210. There the plaintiff, whose name was John Teed, carried on the business of a banker under the name of John and Thomas Teed & Co. He had a son of the name of Thomas, who, it was sworn, had no concern in the bank, but who, for any thing else that appeared in evidence, might have had some interest in its capital or profits. A customer of the bank having overdrawn his account, was sued by John Teed alone, but it was held that the evidence was not sufficient to show that Thomas was a merely nominal partner and that he, therefore, ought to have joined in the action.

If a nominal partner is a party to the contract sued upon, he must be a party to the action brought upon it. Thus, in Guidon v. Robson, 2 Camp. 302, the plaintiff carried on business under the name of Guidon & Hughes, and in that name he drew a bill on the defendant, who accepted it, but failed to pay it when due. Hughes was a salaried clerk, employed by the plaintiff in his business, but he was not a partner, and had no share in the profits. It was nevertheless held that, as his name was on the bill, he ought to have joined in the action. The above cases are sufficient to show under what circumstances a nominal partner must join as a co-plaintiff with the real partners, and under what circumstances he need not do so. But there yet remains this further question, whether he may join in those cases in which it has been established that he need not? Mr. Collyer is of opinion that he may; Coll. on Part. 467; and he rests his opinion on Bond v. Pittard, 3 M. & W. 357.

But his case, when examined, is not an authority in point, for the so-called nominal partner had a share in the profits, and the decision of the court turned on that circumstance, and on the necessary consequence that both partners were interested in the fund sought to be recovered. Upon principle, the writer ventures to submit that in all cases where a nominal partner need not join, he ought not to do so, for, *ex hypothesi*, he is no party to the contract sought to be enforced, and he has no interest in its subject-matter.

It appears from the foregoing statements that, under certain circumstances, an action may be brought upon a contract entered into on behalf of a firm *either* by all the partners *or* by the individual partner with whom the contract was made, and that, under certain other circumstances, an action upon such a contract ought to be brought by all the partners jointly. But there are also circumstances under which an action ought not to be brought by all the partners, and these remain to be considered. One partner ought always to sue alone upon an ordinary contract entered into with himself, if such contract is to be regarded as made with him as a principal, and not on behalf of himself and others. Therefore, if each of several partners lends money out of his own funds, each must sue alone for repayment of his advance, although the loans

any of those who joined in the contract are omitted as defendants, or some reason is not assigned why they cannot be included, such as that they are dead, or are outlawed, or have become bankrupt. There a difference appears upon the face of the record, the plaintiff himself shows that another ought to be joined, and as it would be absurd to call upon the defendant to plead facts which are already admitted, no plea in abatement is necessary, but the omission may be taken advantage of by demurrer, in arrest of judgment, or upon a writ of error. Thus, in Horner v. Moore,[1] which was debt on a joint bond against one obligor, to which the defendant pleaded *non est factum*, and the jury found it to be the deed of both, judgment was arrested, because it appeared on the face of the declaration that both had sealed the obligation, and both obligors were living.

When non-joinder may be availed of without plea.

SEC. 723. The case just cited is usually considered to sanction the opinion that, to enable the defendant to take advantage of the non-joinder of other defendants, otherwise than by plea in abatement, the declaration should in some manner expressly show that the parties omitted are living, as well as that they sealed. But though this has been laid down by writers of great authority,[2] it ought to be noticed that the contrary opinion has been held in argument, on the ground that where it appears, by the plaintiff's own showing, that there is a co-obligor not sued, the presumption is that the co-obligor is still alive, unless the plaintiff will rebut the presumption he himself has raised, by showing that he is dead, and it has been contended that, as to this point, the case of Horner v. Moore must be a mistake, for, that the fact of the co-obligor being alive could not appear on the declaration.[3] Supposing this opinion to be correct, the case of The

may have been made in pursuance of some arrangement with all the partners, for in the case supposed each loan creates a separate debt to each partner, and they do not altogether form one debt to the firm. See Thacker v. Shepherd, 2 Chitty, 652; Brand v. Boulcott, 3 Bos. & P. 235. Again, if one partner alone holds a certain office and does work in his official capacity, he alone ought to sue for payment of the work so done. Brandon v. Hubbard, 2 Brod. & Bing. 11.

As a partner who, on behalf of himself and copartners, enters into a contract under seal, is alone liable to be sued on such contract, he is for all the purposes of that contract, and as between himself and the other parties to it, in the position of a principal and not of an agent. If, therefore, the contract is for the payment of money by him, and the money is paid out of the funds of the firm, and it then appears that the contract was invalid on the ground of fraud, the partner who sealed the contract is the proper person to sue for the recovery back of the money."

[1] Cited in Rice v. Shute, 5 Burr. 2614.

[2] 1 Wms. Saund. 291 c.; 1 Chit. Pl. 46 (6th ed.)

[3] Per Marryatt, arg., Rex v. Chapman, 3 Anstr. 818; see, also, Blackwell v. Ashton, Aleyn, 21; South v. Tanner, 2 Taunt. 254, and Wats. Part. 488.

King v. Young appears to have been rightly decided. That case, according to one report of it,[1] was *scire facias* against two defendants, stating that they and *two other persons* (not averring such two other persons to be living), by bond sealed with their seals, became jointly and severally bound to the King in 4,000*l.*, and stating non-performance, etc., the court were of opinion that, as abatable matter appeared on the *scire facias*, it was not necessary for the defendant to plead in abatement, and they gave judgment that the *scire facias* should be quashed.

But although, from the pleadings of the *plaintiff*, it may possibly be presumed in favor of the defendant who is sued, that another person who ought to be a co-defendant is still alive, yet in no case can it be presumed that such other person has sealed the bond. An express averment must be made of that fact, on one side or the other.[2]

Non-joinder of dormant partners.

SEC. 724. The non-joinder of a *dormant* partner as co-defendant cannot even be pleaded in abatement, where the plaintiff has no means of knowing of the partnership, for, if I deal with A, he cannot, in reference to that transaction, say there is a contract between him and B, of whom I know nothing, thus compelling me to be a joint creditor of those two, whose joint property may be scarcely any thing, and not the sole creditor of the only man I knew.[3]

If the creditor at the time of the contract was ignorant that his debtor had a dormant partner, he may at his option sue the debtor separately or jointly with the dormant partner.[4] But if he was not ignorant of that fact, he ought regularly to make the dormant partner a co-defendant with the ostensible partner. If he does not, and the non-joinder is objected to, it will be left to the jury to say with what parties the contract was intended to be made.[5] In De Mautort v. Saunders,[6] an action was brought on a bill of exchange drawn upon two persons in London, by the name of Saunders Brothers & Co. It was pleaded in abatement that the promises were made by two other persons named in the plea, jointly with the defendants;

[1] 6 T. R. 769. In 2 Anstr. 448, it is said to have been a *scire facias* on a recognizance, not on a bond. See 1 Wms. Saund. 291, and note *c*.

[2] Cabell v. Vaughan, 1 Saund. 291, note *t*. But proof of a party's signature is presumptive evidence of his having sealed. Grellier v. Neale, 1 Peake, 145; Fasset v. Brown, id. 23.

[3] Ex parte Norfolk, 19 Ves. 455; Baldney v. Ritchie, 1 Stark. 338; Doo v. Chippenden, Abbott on Shipping, 76; Crellier v. Neale, 1 Peake, 146; Ex parte Hamper, 17 Ves. 412; Robinson v. Wilkinson, 3 Price, 538.

[4] Ex parte Layton, 6 Ves. 433.

[5] Mullett v. Hook, 1 Mood. & Malk. 88; Stansfield v. Levy, 3 Stark. 8.

[6] 1 Barn. & Ad. 396, overruling Dubois v. Ludert, 1 Marsh. 248.

and the defendants proved that the two other persons named in the plea were partners with them, and resided at the Mauritius where the bill was drawn, and where the plaintiff also resided. Lord Tenterden told the jury that it was clearly established in proof that all the four persons were in partnership together, though it did not appear that the fact of such partnership was known to any person at the Mauritius; that it was a question for them upon the evidence, whether the holder of the bill might reasonably have considered that the defendant alone constituted the house of Saunders Brothers & Co. If he had reasonable ground so to think, then he must be taken to have contracted with them alone, and in that case the verdict ought to be for the plaintiff, but if they thought that any circumstance, such as the addition of the words "& Co.," ought to have induced him to think that there were other partners, then the verdict should be for the defendants. The jury found for the plaintiff, and, upon a motion for a new trial, the Court of King's Bench refused the rule and held the direction to the jury to be right.

A dormant partner may be sued alone, unless he plead the partnership in abatement.[1]

It is to be borne in mind that the rules just stated as to dormant partners apply only to cases of implied contract, such as a partnership contract usually is. Where a contract in writing is entered into by the ostensible partners of a firm only, without the dormant partner, the party contracted with cannot sue the dormant partner on this contract.[2]

Non-joinder of infant partner.

SEC. 725. If one partner was an infant at the time of the contract, and has not, since the attainment of his majority and before the commencement of the action,[3] ratified the contract by some writing with his signature affixed,[4] he ought not to be made a co-defendant. For if he be joined in the action, and plead his infancy, the plaintiff cannot enter a *nolle prosequi* as to him and proceed against the other, as is allowed by the statute in cases of bankruptcy, but he must discontinue the action and commence a new action against the adult defendant, he being the sole contracting party according to the legal effect of such a contract.[5]

[1] Per Lord Kenyon, Saville v. Robinson, 4 T. R. 720.

[2] Beckham v. Knight, 4 Bing. N. C. 243.

[3] Thornton v. Illingworth, 2 Barn. & Cres. 824; 4 Dowl. & Ryl. 545; but see Ex parte Henderson, 4 Ves. 164.

[4] 9 Geo. 4, c. 14, s. 5.

[5] Chandler v. Parkes, 3 Esp. 76; Jaffray v. Frebain, 5 id. 47.

On the other hand, if the plaintiff omit to sue the infant partner, then, although the defendant may plead the non-joinder of his copartner in abatement, such plea will not prevail if the plaintiff reply that the defendant omitted is an infant.[1] Therefore it has been held that if one of two partners is an infant, the holder of a bill accepted by both partners may declare on it as accepted by the adult only in the name of both, and if the defendant pleads in abatement that the other partner ought to be sued, the plaintiff may reply his infancy, which is no departure, and the action may proceed.[2] In these cases it is to be observed that infancy is the proper reply, and that the plaintiff cannot reply that the promise was made by the adult defendant solely, and not by him and the infant jointly.[3]

If an infant partner be made a co-defendant in an action of assumpsit or debt, and intend to resist the action on the ground of infancy, he must plead his infancy specially.[4]

Nonjoinder of bankrupt partner.

SEC. 726. Where one partner has become bankrupt and obtained his certificate, it is not necessary to make him a co-defendant, for if the nonjoinder of him as defendant be pleaded in abatement, the plaintiff may reply that he has been discharged by bankruptcy and certificate,[5] and the same sort of replication will be admissible if the party omitted has been discharged under the Insolvent Act.[6] But if the bankrupt have not obtained his certificate, he should be joined as a co-defendant.[7]

When one partner is dead.

SEC. 727. If one of several partners die, the action must be brought against the survivors.[8] And if the executor of the deceased partner be sued, he must plead the survivorship in bar.[9] Upon the death of the last surviving partner, an action on the partnership account must be brought against the executors only, without joining the executors of the other partners.[10] If a partner defendant die pending the action, the writ or action shall not be thereby abated, but such death being

[1] Gibbs v. Merrill, 3 Taunt. 307; Chandler v. Parks, *supra*.
[2] Burgess v. Merrill, 4 Taunt. 468.
[3] Chandler v. Parks, *supra*.
[4] Reg. Gen. H. T. 1834; Assumpsit, 3; Debt, 3.
[5] Stat. 3 & 4 Will. 4, c. 42, s. 9.
[6] Stat. 3 & 4 Will. 4, c. 42, s. 9.
[7] 1 Chit. Pl 44.
[8] Richards v. Heather, 1 Barn. & Ald. 29.
[9] Postan v. Stanway, 5 East, 261; Godson v. Good, 6 Taunt. 587; Reg. Gen. H. T. 1834, *Assumpsit* 3.
[10] Calder v. Rutherford, 1 Brod. & Bing. 302; 7 Moore, 158.

suggested on the record, the action shall proceed against the surviving defendant or defendants.[1]

Outlawry of one partner.

SEC. 728. On the outlawry of one of several partners, the action must be proceeded in against that defendant only who appears.[2] But the outlawry does not alter the right as it originally stood. Therefore, where the plaintiff brought an action against two defendants, and proceeded to outlawry against one, and went on with the action against the other, who died after interlocutory and before final judgment, it was held that he could not have a *scire facias* against the administrator of the deceased partner; for, notwithstanding the outlawry, the action remained joint, and, therefore, survived against the other defendant.[3]

When demurrer lies because too many persons are sued.

SEC. 729. If too many persons be made defendants, and the objection appear on the pleadings, either of the defendants may demur, move in arrest of judgment, or support a writ of error; and, if the objection do not appear on the pleadings, the plaintiff may be nonsuited upon the trial, if he fail in proving a joint contract either in law[4] or in fact;[5] for, though in actions for torts one defendant may be found guilty and the other acquitted, yet in joint actions for the breach of contracts, whether they be framed in *assumpsit*, covenant, debt, or case, a verdict or judgment cannot in general be given against one defendant without the other,[6] and where there are several defendants, the nonsuit of the plaintiff is for the benefit of all.[7]

It is, however, enacted by the 10th session of the stat. 3 & 4 Will. 4, c. 42, that in all cases in which, after a plea in abatement, the plaintiff shall, without having proceeded to trial upon an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable as a

[1] 8 & 9 W. 3, c. 11, s. 7.
[2] Guy v. Goddard, 1 Keb. 642; 1 Sid. 173.
[3] Fort v. Oliver, 1 Mau. & Sel. 242.
[4] Noke v. Ingham, 1 Wils. 89; Eliot v. Morgan, 7 C. & P. 334.
[5] Shirreff v. Wilks, 1 East, 48.
[6] 1 Chit. Pl. 36; Cooper v. Whitehouse, 6 Car. & P. 595.
[7] Blake's case, 1 Sid. 378.

contracting party or parties, the plaintiff shall nevertheless be entitled to judgment, or to a verdict and judgment, as the case may be, against the other defendant or defendants who shall appear to be liable, and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiffs, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the non-joinder of such person, provided that any such defendant, who shall have so pleaded in abatement, shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement.

It may also be remarked that if several persons are sued as partners, who are not all partners, and they pay money into court in respect of the contract on which they are sued, they are estopped by such payment from taking any objection for misjoinder at the trial.[1]

Of the parties to action ex delicto.

SEC. 730. If several partners jointly commit a tort, the plaintiff has his election to sue all or any of the parties, because a tort is in its nature the separate act of each individual; therefore, in actions *ex delicto*, such as trespass, trover, case for malfeasance, and the like, against one only, for a tort committed by several, he cannot plead it either in abatement or in bar, or give it in evidence on the general issue. A plea in abatement can only be where regularly all the parties ought to be joined, and not where the plaintiff may join them all or not at his election.[2] Therefore, to an action on the case against several part-owners of a ship, for the negligence of their servant in running down a ship of the plaintiffs' laden with sugar, whereby the sugar was lost, it was held clearly that the defendants could not plead in abatement that there were other part-owners not joined in the suit.[3]

It has been said that if the plaintiff himself shows in his declaration, or other pleading, that the tort was jointly done dy the defendant and A B, the action shall abate;[4] but Mr. Serjeant Williams observes that there is no good ground for this distinction.[5]

---

[1] Ravenscroft v. Wise, 1 C. M. & R, 202.

[2] 1 Wms. Saund. 291 e; Wats. Part. 424; Rich v. Pilkington, Carth. 171; Child v. Saund, id. 294, 1 Salk. 32; Sutton v. Clarke, 6 Taunt. 29; Nicoll v. Glennie, 1 Mau. & Sel. 588; Morrow v. Belcher, 4 Barn. & Cres. 704; but see Wallis v. Savil, Lutw. 41.

[3] Mitchell v. Tarbut, 5 T. R. 649.

[4] Brickhead v. Archbishop of York, Hob. 199.

[5] 1 Wms. Saund. 291 f.

Actions against common carriers for a breach of duty in their capacity of carriers may be either laid down in case, charging them with a breach of duty imposed by the custom of the realm, the breach being in such case considered as a tort, or they may be laid in assumpsit, the breach being then considered as a breach of contract. Both of these modes of declaring have been established by precedent, but as all actions of this nature involve considerations of contract, they will be the subject of discussion in the ensuing section.

What has been said regarding the joinder of one or more defendants in tort does not apply to actions which concern real property. For where there are several owners or persons chargeable as joint tenants, or tenants in common, in respect of their real property, though the action be in form *ex delicto*, they should all be made defendants, or the party who is sued alone may plead in abatement.[1]

There are various torts which in legal consideration may be committed by several, and for which a joint action may be supported against all the parties. But if several persons be made defendants jointly, where the tort could not in point of law be joint, they may demur; and if a verdict be taken against all, the judgment may be arrested or reversed on a writ of error; but the objection may be remedied by the plaintiffs' taking a verdict against one only, or, if several damages be assessed against each, by entering a *nolle prosequi* as to one after the verdict, and before judgment.[2] There cannot, however, be a nonsuit as to one, and a verdict against the others.[3]

Of the parties to actions ex quasi contractu.

SEC. 731. It may, perhaps, be laid down, 1, that in all actions *ex quasi contractu*, except against common carriers for breach of their duty as carriers, the same rules are applicable in regard to the parties to be made defendants, as in actions *ex contractu;* 2, that these rules are applicable to actions against common carriers, when the declaration states a special contract; 3, that, otherwise, an action against a common carrier is to be considered as entirely laid in *tort*, and attended with all the consequences of an action in *tort*, it being an ancient action, founded on the custom of the realm, against a public servant, for the breach of his public duty.

In regard to actions against common carriers, it was held in a series of decisions that if the declaration was grounded on contract, and

[1] 1 Wms. Saund. 291 *f*; Bro. Action on the case, 32; 1 Saund. 291.
[2] 1 Chit. Pl. 77.
[3] Revett v. Browne, 2 Moore & Payne, 18.

not on *tort* though the contract as stated was only general and arising by implication, the action must be considered as in the nature of an action *ex contractu*, and, therefore, liable to a plea in abatement, if all the joint contractors were not sued. Thus in Boson v. Sandford,[1] the plaintiff declared: "That, whereas, on the 10th day of May, 1685, the plaintiff had, at London, delivered and laden, on board the ship;[2] called, etc., whereof the defendants were then and there owners (in which said ship the goods and wares of persons requiring the carriage thereof were commonly carried and transported, for reasonable freight and salary), divers goods and wares of the said plaintiff, to wit, etc., in good order and well conditioned, to be safely transported, etc., for a reasonable freight and salary by the plaintiff to the defendants, for such carriage thereof, to be paid; and the said defendants, the same goods, etc., then and there had and received, and them to transport and carry, in form aforesaid, did undertake, nevertheless the defendants, not regarding their duty in this behalf, fraudulently intending to injure, etc., the said goods and wares, in such good order and condition as they were at the time of the delivery and lading thereof on board the aforesaid ship, to the said plaintiff did not deliver, but the same goods, etc., so improvidently and negligently did place, carry, and keep in the said ship, in the said voyage, that by the default of the defendants and their servants, etc., the said goods, by the sea water coming into the said ship, were spoiled and damnified." To this declaration the defendants pleaded not guilty, and, upon special verdict found — "that there was a master of a vessel who acted that the goods were delivered to him and lost, and that the defendants were proprietors, and that here are others not named," etc., — the court gave judgment for the defendants, all the judges agreeing that the action, though in form *ex delicto*, was grounded in contract, and that the other parties ought to have been named, that the declaration was, that the defendant *super se susceperunt*, and that it was the same as if it had been said *super se assumpserunt*, in consideration of a promise to pay the hire, that the goods should be safe carried.

So in Powell v. Layton,[3] the declaration stated that the plaintiff, "at the special instance and request of the said defendant, had caused to be delivered to the said defendant divers goods, to wit, etc., to be carried and conveyed by him, the said defendant, on board, etc., to

[1] 2 Show. 478; 1 id. 101.

[2] Shipowners may be common carriers. Morse v. Slue, 1 Ventr. 190; 2 Lev. 69. The contrary is said *arguendo*, 2 Chit. 2.

[3] 2 N. R. 370.

be delivered in the like good order, and well conditioned, all and every the dangers and accidents of the sea, and of navigation, etc., excepted, unto order, for certain freight to be therefor paid to the said defendant, and although the said defendant took and received the said goods, etc., and although the dangers, etc., did not prevent, etc., yet the said defendant, not regarding his duty, did not, etc., carry, convey and deliver the said goods, or any part thereof, according to his said duty, but wholly failed and neglected so to do, and so carelessly and negligently, etc., that the goods were lost." The defendant pleaded in abatement the non-joinder of the other persons who were his partners, and jointly interested in the vessel, and, upon demurrer, the court gave judgment for the defendant, Mansfield, C. J., observing that although the word *suscepit* was not used in the declaration, yet the nature of the charge was, that the defendant agreed to carry the goods to Sicily, and had failed in the performance of his agreement.

In Max v. Roberts,[1] the point in the cause was decided on the same principle, although the question arose in a different shape. There, the declaration stated that the defendants were owners of a ship, and that the goods were shipped on account of the plaintiff, to be carried, etc. On the trial he failed in proving that the defendant Roberts, and the eight other defendants, were part-owners; by his evidence he affected the eight only. The court gave evidence of nonsuit.

But the doctrine contained in the foregoing cases, unless any of them be considered to involve special contracts,[2] must now, if applicable in any case, be confined to carriers by water; for with respect to carriers by land, unless a special contract appear on the declaration, it is unnecessary for the plaintiff to sue all the carriers. For by the statute 11 Geo. 4 & 1 Will. 4, c. 68, sects. 5 and 6, any one or more mail contractors, stage coach proprietors, or common carriers by land for hire, shall be liable to be sued by his, her, or their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or copartner in such mail, stage coach, or other public conveyance by land for hire. Pro-

[1] 2 N. R. 365.

[2] Lord Ellenborough considered the contract in Powell v. Layton to be of a special nature. "The ship," he said, "was neither alleged to be a common ship, nor the defendant to be a common carrier. The declaration, moreover, referred to terms of express contract, for it alleged that the goods were to be delivered, all dangers and accidents of the seas and of navigation of whatever kind excepted, which exception could only have subsisted by virtue of an express contract." 6 Mau. & Selw. 389.

vided that nothing in the act shall extend, or be construed to annul, or in any wise affect any special contract for the conveyance of goods.

And, independently of the statute just referred to, the inclination of the courts, at present, seems to be to consider actions against common carriers as laid in *tort*, unless the declaration state very explicitly a case of contract. This observation is, of course, applicable to all common carriers, whether by land or by water. In Ansell v. Waterhouse,[1] the declaration charged the defendant as proprietor of a common stage coach for carrying passengers from London to Manchester for hire, and that he received M A as a passenger to be safely carried from Manchester to Liverpool, for a certain fare, and by reason thereof, ought carefully to have conveyed her; yet the defendant, not regarding his duty, conducted himself so carelessly, that by the negligence of him and his servants, and for want of due care and attention to his duty, the coach was overturned, whereby M A was injured. The defendant pleaded in abatement the non-joinder of the other proprietors as co-defendants, but the Court of King's Bench held that the plea was not sustainable. Lord Ellenborough observed that there was not a word in the declaration sounding in contract, and that there was nothing to oust the plaintiff of the benefit of declaring on the custom with all the consequences. That the practice of declaring against common carriers on the custom of the realm was as ancient as the law itself, and was uniformly adopted until somewhere about the time of Dale v. Hall;[2] since then it had been usual not to declare in this form, but in contract; yet, the modern use did not supersede, although it had supplanted the former practice of declaring in tort. That the advantage of proceeding on the custom of the realm was, that the plaintiff might sue one or more of several tort-feasors, as in tort all the parties need not be joined.

In the case of Bretherton v. Wood,[3] the cause of action and the declaration were nearly the same as in the preceding case. The defendants, however, pleaded not guilty, and the jury having found all guilty except two, judgment was entered up accordingly. A writ of error was then brought, averring that judgment should have been given either against all or for all the defendants, but the court affirmed the judgment, holding that the declaration in this case was laid in tort.

[1] 6 Man. & Selw. 385; 2 Chit. 1. It seems that in an action on the case against stage coach proprietors, for an injury from mismanagement in driving the coach, the proprietors and the coachman may be sued jointly. Whitamore v. Waterhouse, 4 Car. & Pay. 385.

[2] 1 Wils. 281.

[3] 6 Moore, 141; 3 Brod. & Bing. 52.

Again, in the late case of Pozzi v. Shipton,[1] the declaration contained no words of contract, but, on the other hand, it did not expressly aver that the defendants were carriers. The Court of King's Bench, however, were of opinion that the declaration might be read as founded on the general custom of the realm, and, consequently, that a verdict which had been obtained against one defendant and in favor of the other was maintainable. The declaration, which was in case, stated that the plaintiff delivered to the defendants, and they accepted and received from him, goods, to be taken care of and conveyed by the defendants from Liverpool to Birmingham, and there delivered to A, for the plaintiff, for reasonable reward to the defendants in that behalf; and thereupon it became the duty of the defendants to take due care of such goods while they so had the charge thereof for the purpose aforesaid; and to take due and reasonable care in and about the conveyance and delivery thereof as aforesaid; yet the defendants, not regarding their duty, etc., did not nor would take due care, etc., and that the goods were injured, to the plaintiffs' damage. At the trial it was proved satisfactorily that the defendant, against whom the verdict was obtained, was a common carrier, and it was not objected at the time that proof of an express contract was necessary in order to sustain the declaration. Under these circumstances, the Court of King's Bench refused to disturb the verdict, observing, that as the language of the declaration was consistent with the action being founded on the general custom, and as there were no words of express contract, the court after verdict was bound to read it as founded on the custom, and that it was not then necessary to say whether the want of an express averment that the defendants were common carriers for hire, would have been good on special demurrer.

Other actions ex quasi contractu.

SEC. 732. However, as to actions *ex quasi contractu* against partners, other than those which we have just noticed, it seems most consistent with principle, and most agreeable with the tenor of modern authorities, that they should be considered as actions *ex contractu*, and that the form of the action is not to vary the right of defense.[2] The case of Govett v. Radnidge,[3] which is at variance with this doctrine, appears to be no longer law. That was an action against three, wherein the plaintiff declared that they had the loading of a hogshead of the plaintiffs', for a certain reward to be paid to one of

[1] 8 Ad. & Ell. 968; 1 Per. & D. 4. [2] 1 Chit. Pl. 86, note *b*. [3] 3 East, 62.

them, and a certain other reward to the other two, and that the defendants so negligently conducted themselves in the loading, etc., that the hogshead was damaged, and it was held that the gist of the action was the tort, and not the contract out of which it arose; and, therefore, that on the plea of not guilty, the two being acquitted, judgment might be had against the third, who was found guilty. But this case has been expressly disapproved of,[1] and Lord Ellenborough, who delivered the judgment of the court in Govett v. Radnidge,[2] seems himself on a subsequent occasion to have doubted its authority.

In Weal v. King,[3] the declaration stated that the plaintiff bargained with the defendants for certain lambs as sound lambs, and then alleged a deceit to have been effected on him by means of a warranty made by the defendants upon a joint sale to him of both of the lambs, their joint property; it was held that the action, though laid in tort, was founded on the joint contract alleged, and, therefore, that the plaintiff could not recover upon proof of sale and warranty by one only, as of his separate property.

It is to be observed that in the case just cited an express joint contract appeared on the face of the declaration, and, indeed, the allegation of a joint contract of sale was not only material, but essentially necessary to the joint warranty alleged upon record to have been made with the supposed sellers. It might, perhaps, be a question whether, if an action on the case were brought against several defendants, in a matter where there is no action by the custom of the realm, and no express or particular contract were stated on the declaration, such action would be considered as laid in tort or in contract; but, upon the whole, it is conceived that the court would look to the real nature of the case, without reference to the form of the declaration, and would hold the action to be attended with the consequences of tort or contract, according as tort or contract was the essence of the actual transaction between the parties.[4]

All partners must be sued.

SEC. 733. We have seen that under a contract made with the firm all the partners must be sued,[5] but that where a separate security is

---

[1] 2 N. R. 372.
[2] 12 East, 454.
[3] 12 East, 452.
[4] See and consider Jennings v. Rundall, 8 T. R. 335; Green v. Greenbank, 2 Marsh. 485; Marzetti v. Williams, 1 Barn. & Adol. 415; Burnett v. Lynch, 5 Barn. & Cres. 589; Newberry v. Colvin, 7 Bing. 190.
[5] But the fact that a dormant partner is not joined as a defendant is no ground for an abatement of the action, and a judgment against the known members of the firm may be collected out of the

given for the joint contract, either the party giving the security may be sued separately, or all the partners may be sued jointly. In this last case, if it be intended to sue all the partners, the security must be abandoned and the declaration must be confined to money counts against all the partners.[1]

The liability of partners upon a partnership debt is joint and not joint and several.[2] In equity, however, the liability is treated as being

---

partnership property. Van Valm v. Russell, 13 Barb. (N. Y.) 590. His non-joinder as a plaintiff is not a ground of abatement by those who were not aware of his relation to the firm when they dealt with it. Waite v. Dodge, 34 Vt. 181; Wood v. O'Kelly, 8 Cush. (Mass.) 406; Roger v. Kichline, 36 Penn. St. 293; Clark v. Miller, 4 Wend. (N. Y.) 628.

[1] Emly v. Lye, *ante;* Denton v. Rodie, *ante.*

[2] *Of the nature, extent and duration of the liability of individual members of partnerships and companies to creditors as regards contracts.* — An agent who contracts for a known principal is not liable to be himself sued on the contract into which he has avowedly entered only as agent. Consequently, a partner who enters into a contract in behalf of his firm, is not liable on that contract except as one of the firm: in other words, the contract is not binding on him separately, but only on him and his copartners jointly. See Ex parte Buckley, 14 M. & W. 469; Re Clarke, De Gex, 153; Ex parte Wilson, 3 M. D. & D. 57. One partner may render himself separately liable by holding himself out as the only member of the firm, Bonfield v. Smith, 12 M. & W. 405; De Mautort v. Saunders, 1 B. & Ad. 398, or by so framing the contract as to bind himself not only as belonging to the firm, but independently of his connection with it, Higgins v. Senior, 8 M. & W. 834; Ex parte Wilson, 3 M. D. & D. 57, but unless there are some special circumstances of this sort, a contract which is binding on the firm is at law binding on all not excluding dormant partners, Beckham v. Drake, 9 M. & W. 79; Brett v. Beckwith, 3 Jur. (N. S.) 31, M. R. the partners jointly and on none of them severally. The same principle applies to directors of companies. Contracts entered into by them only as agents of the company are binding, if at all, on the company, and the directors cannot be made individually liable upon them as principals. Lindus v. Melrose, 2 H. & N. 293, and 3 id. 177; Aggs v. Nicholson, 1 H. & N. 165; Russel v. Reece, 2 Car. & Kir. 669. The only exception to this rule is, that a director contracting for a limited company and suppressing the word limited, is liable personally on the contract. Penrose v. Martyn, 5 Jur. (N. S.) 362, Q. B. Formerly it was thought that if an agent entered into a contract on behalf of a principal, and such contract did not bind the principal, he not having authorized it, the agent was himself bound by the contract. According to this doctrine, a contract ostensibly entered into by A through B is twisted into a contract by B, although it was not the intention of either party to the contract that B should be in any way bound by it. The propriety of thus making contracts for persons has been of late very properly questioned and denied, and it is now held that an agent, contracting as such without authority, is not bound by the contract at all, but that he is liable in damages for the consequences ensuing from his having assumed to act with an authority which in fact he did not possess. It is also most properly held that he is thus liable although he acted *bona fide* and in the belief that he had the authority he assumed. See, on this subject, Jenkins v. Hutchinson, 13 Q. B. 744; Lewis v. Nicholson, 18 id. 503; Randell v. Trimen, 18 C. B. 786; Collen v. Wright, 7 E. & B. 301; and 8 id. 647; Simons v. Patchett, 7 id. 568; Eastwood v. Bain, 3 H. & N. 738, where the plaintiff had not sustained damage. It results from the foregoing observations that a partner who enters into a contract avowedly on behalf of the firm, and so as to bind the firm, incurs no liability upon the contract except as one of the members of the firm; whereas if he enters into a similar contract which for want of authority does not bind the firm, he is individually and separately answerable for the damages sustained by the other party to the contract by reason of the unwarranted as-

both joint and several, but at law it is joint, and an action cannot be brought against one partner alone, but all must be joined as defendants.'

The obligation is joint, and not joint and several, and all the part-

sumption of authority. The liabilities of directors of companies are precisely similar in this respect to those of partners, with the exception already noticed in the case of limited companies. But although the liability of the members of an ordinary partnership in respect of the debts and engagements of the firm is at law joint only, their liability is in equity not only joint, but also several, except under special circumstances. In equity, if several persons contract a debt, they are not only jointly but also severally liable to repay it, Bishop v. Church, 2 Ves. Sr. 100, 371; Primrose v. Bromley, 1 Atk. 90; Simpson v. Vaughan, 2 id. 31; Clavering v. Westley, 3 P. W. 402; Darwent v. Walton, 2 Atk. 570; Lane v Williams, 2 Vern. 292; and see Sleech's case, 1 Mer. 539, and Devaynes v. Noble, 2 R. & M. 495, and the cases there commented on, unless their obligation is created by some instrument which in terms imposes upon them a joint obligation only. Upon this subject it may be useful to refer to one or two leading cases. In Bishop v. Church, 2 Ves. Sr. 100, 371 (Simpson v. Vaughan, 2 Atk. 31, is a very similar case) two partners borrowed 2,000*l*., for which they afterward gave their joint bond. One of them then died, and the other became bankrupt. A bill was filed by the creditor for payment of the bond out of the estate of the deceased partner; and it was held that his estate continued liable notwithstanding that it was discharged at law, the bond being joint and not joint and several. In this case it was also held that the bond ought to be treated as joint and several so as to make the estate of the deceased partner liable as for a specialty debt and not as for a simple contract debt, as would have been the case without the bond. The following cases are to the same effect as Bishop v. Church, viz., Simpson v. Vaughan, 2 Atk. 31; Thomas v. Frazer, 3 Ves. 399; Burn v. Burn, id. 573; Orr v. Chase, 1 Mer. App. 729. In Jacomb v. Harwood, 2 Ves. Sr. 265, two persons were partners, and were as such indebted on simple contract to the plaintiff. One of them died, having made the other his executor. The plaintiff afterward sued the surviving partner as such, and obtained judgment against him, and not obtaining satisfaction, filed a bill claiming payment as a creditor out of the assets of the deceased. It was held that the assets were liable notwithstanding the judgment, the debt being all along a partnership debt, only bettered by being converted from a simple contract into a judgment debt. In this case there was an agreement between the creditor and the surviving partner that the judgment should not affect the creditor's right of obtaining payment from the assets of the deceased partner; but this circumstance does not appear to have been relied upon by the court. The doctrine acted on in Bishop v. Church, and other cases of the same sort, is applied not only for the benefit of creditors against the partners and their representatives, but also as between competing creditors. This was settled in Burn v. Burn, 3 Ves. 573, and see Simms v. Barry there cited. In that case, partners being indebted to a large amount, gave to their creditor a joint bond; one of the partners died; the others afterward became insolvent; and a bill was filed by the bond creditor for payment out of the estate of the deceased partner. Two questions then arose between the plaintiff and the simple contract creditors of the deceased partner, viz., first, whether the plaintiff could rank as a creditor at all against the assets of the deceased? and secondly, whether, if he could, he should rank as a specialty or only as a simple contract creditor? The court decided both questions in favor of the plaintiff, and held that he was entitled to rank as a specialty creditor, although the consequence was that, after satisfying his demand, little remained for payment of the other creditors. But it must not be supposed that in equity every liability contracted by partners is several as well as joint. It is a question of intention on the part of the firm and on the part of those with whom it deals. If, therefore, partners enter into a contract binding themselves jointly and not severally, and if such contract is not a mere security for the payment of a pre-existing debt, or for the performance of a pre-existing joint and several obligation, and if it has not been made joint in form by mistake, the effect of the contract will be in

ners must be made defendants. Even where the contract is made upon the credit of one of the partners, the plaintiff not knowing at the time of giving credit that it was for the benefit of the firm, he may, upon discovering the fact, proceed against all.[1]

---

equity as at law to impose a joint obligation and no other. See, in addition, Richardson v. Horton, 6 Beav. 185; Jones v. Beach, 2 De G. Mc. & G. 886; Other v. Iveson, 3 Drew. 177; Rawstone v. Parr, 3 Russ. 424, 539.

A leading case on this head is Sumner v. Powell, 2 Mer. 30, affirmed on appeal, T. & R. 423. There one of a firm of partners died, the firm being at the time of his death liable for a breach of trust committed by one of its members. A new partner was admitted into the firm, and a deed was executed between the executors of the deceased partner and the surviving partners and the new partner, whereby, in consideration of certain payments by the executors and of a release by them of all demands, the surviving partners and the new partner covenanted jointly to indemnify the executors from the debts and liabilities of the old firm. A suit was afterward instituted in respect of the breach of trust, and the executors were ordered to make good the same out of the assets of their testator. The executors then filed a bill to be indemnified out of the estate of the new partner, and contended that the covenant into which he had entered, though joint in form, ought to be considered as joint and several. But it was held otherwise, for the obligation of the new partner to indemnify the plaintiffs existed only by virtue of his covenant, and the extent of the obligation could, therefore, be measured only by the words of such covenant. Again, in Clark v. Bickers, 14 Sim. 639, a lease was made to two partners jointly of land wanted by them for partnership purposes. The demise and lessees' covenants were all joint. After the death of one of the partners his executors were sued in equity in respect of various breaches of covenant, and it was contended that the covenants ought to be treated as joint and several. But it was held on demurrer that no equity arose to the lessor from the fact that the lessees were copartners; that the lessors were *domini factorum*, and determined for themselves how their leases should be granted. The demurrer was consequently allowed. The same doctrine was acted on and even carried further in Wilmer v. Currie, 2 De G. & Sm. 347. In that case three partners dissolved partnership, one of them, the plaintiff, retiring. By a deed made between the three partners, the plaintiff assigned all his share and interest to the other two, and they jointly covenanted to pay the debts of the firm and indemnify the plaintiff therefrom, and to pay the plaintiff certain sums of money. One of the two continuing partners having died, and the covenants not having been performed, the plaintiff filed his bill against the surviving partner and the executors of the deceased partner, in order to obtain the sums remaining due to him, and to have the unliquidated partnership debts paid. But it was held on demurrer that the plaintiff had no equity against the estate of the deceased partner; for although that partner was, irrespectively of the deed, liable to contribute toward payment of the partnership debts, that was different from the obligation which arose by virtue of the covenant of which the plaintiff sought the benefit.

As regards torts.— For torts imputable to a firm all the partners are liable jointly and severally. Mitchell v. Tarbutt, 5 T. R. 649; 1 Wms. Saund. 291, f and g; Com. Dig. Abatement, F. 8. To this general rule an exception occurs where an action in form *ex delicto* is brought against several persons in respect of their ownership in land, for then they are liable jointly, and not jointly and severally. See 1 Wms. Saund. 291, f and g. Although for general purposes it may be convenient to distribute acts of forbearances which give rise to obligations under the heads breach of contract and tort, it would not be difficult to show the impossibility of always distinguishing between the two. And yet if it be held, as it is at law, that a breach of a contract binding on the firm imposes a joint liability only, whilst a tort imputable to the firm imposes a joint and several liability, the importance of being able accurately to distinguish between a breach of contract and a tort becomes apparent. The

[1] Farr v. Wheeler 20 N. H. 575.

Action against surviving partner.

SEC. 734. Upon the death of a partner the plaintiff may, in his declaration against the surviving partner, include a demand against him as survivor, with a demand against him as if he were solely lia-

---

difficulty, however, of doing so is increased by the doctrine that there are cases in which the same wrong may be regarded from two different points of view, and may, at the option of the person injured, be made the foundation either of an action *ex contractu* or of an action *ex delicto*. See, on this subject, Brown v. Boorman, 11 Cl. & Fin. 1, and the cases there referred to, and especially Powell v. Layton, 2 Bos. & P. N. R. 365, Bretherton v. Wood, 3 Brod. & Bing. 54; Pozzi v. Shipton, 8 A. & E. 963; Boson v. Sandford, 2 Show. 29 and 101. Suppose, for example, that property is intrusted to a firm of bankers for the purpose of sale and investment, and that some member of the banking firm misapplies the property so intrusted. This breach of duty is a breach of the contract which was tacitly, if not expressly, entered into by the bankers when they received the property. But the misapplication of the property is a wrong independently of any contract, amounting in effect to a conversion or destruction of that which belonged to the customer. Regarded as a breach of contract, the liability arising therefrom would be joint, whilst regarded as a wrong independently of contract, the consequent liability would be joint and several. In a court of law the tendency would apparently be to consider the wrong as a breach of contract. See the cases last cited. But be this as it may, in equity the wrong would be held to impose a joint and several liability on all the partners, on the ground that each partner was bound to see to the proper application of what was intrusted to the firm. See Blair v. Bromley, 2 Ph. 354; Sadler v. Lee, 6 Beav. 324. In such cases as these the several liability of each partner to the creditors of the firm is not affected by the circumstance that the act imposing such liability was done by one only of the members of the firm, without the knowledge or consent and in fraud of the others. If the act in question imposes a liability which, upon the principles of agency, can be imputed to the firm, each member thereof will in equity be held severally liable for such act just as much as if there had been no fraud in the case. See Vulliamy v. Noble, 3 Mer. 619; Clayton's case, 1 Mer. 576; Warde's case, id. 624, and it is well established in equity that a breach of trust, which is imputable to several persons, imposes upon them a liability which is both joint and several. Devaynes v. Noble, Sleech's case, 1 Mer. 563; Baring's case, id. 614; Sadler v. Lee, 6 Beav. 324; Brydges v. Branfil, 12 Sim. 369; Blair v. Bromley, 2 Ph. 359; Wilson v. Moore, 1 M. & K. 127 & 337.

Extent of liability.— By the common law every member of an ordinary partnership is liable to the utmost farthing of his property for the debts and engagements of the firm. The law, ignoring the firm as any thing distinct from the persons composing it, treats the debts and engagements of the firm as the debts and engagements of the partners, and holds each partner liable for them accordingly. Moreover, if judgment is obtained against the firm for a debt owing by it, the judgment creditor is under no obligation to levy execution against the property of the firm before having recourse to the separate property of the partners; nor is he under any obligation to levy execution against all the partners ratably, but he may select any one or more of them and levy execution upon him or them until the judgment is satisfied, leaving all questions of contribution to be settled afterward between the partners themselves. See per De Grey, C. J., in Abbot v. Smith, 2 Wm. Bl. 949, and Woolley v. Kelly, 1 B. & C. 68; Com. Dig. Execution, H. This doctrine of unlimited liability applies by common law not only to ordinary partnerships, but to all unincorporated companies without exception. See Keasley v. Codd, 2 Car. & P. 408 n; Carlen v. Drury, 1 V. & B. 157; R. v. Dodd, 9 East, 516; Robinson's Executors' case, 6 De G. Mc. & G. 572, but not to incorporated companies. The doctrine in question, however, has been extended by the statute to all companies incorporated by mere registration, with the exception of those expressly registered with limited liability. Omitting for the present all reference to statutes, it is proposed to notice the attempts

ble. An action also on the partnership account may be maintained against the survivor without describing him as such, for if both had been alive and one only had been sued, it would, as we have seen, have

which from time to time have been made with more or less success to form partnerships, in which the liability of the members should be less extensive than it would be under ordinary circumstances. These attempts may be ranged under two heads, according as there has or has not been some special agreement with the creditors. So inflexible is the doctrine of unlimited liability, and so important is it that no doubts shall be cast upon it, that judges have frequently denounced in the strongest terms the conduct of those who have endeavored to inveigle the public into taking shares in concerns by asserting that "no one shall be liable beyond the amount of his subscription." Nothing can be more delusive or worthless than such statements as applied to unincorporated bodies, for although the subscribers themselves may stipulate with each other for such a contracted liability, nothing is more clear than that, as to the rest of the world, each partner is liable for the whole amount of the debts of the partnership. R. v. Dodd, 9 East, 516. Nor will notice that a stipulation of this kind has been entered into between the partners prevent a creditor from holding each of them liable to the full extent of his demand. See Greenwood's case, 3 De G. Mc. & G. 459. Notwithstanding, however, this general rule by which each partner is liable for all the debts and engagements of the firm, it is competent for any one dealing with the firm to contract not to hold the partners liable to an unlimited extent. For example, if one person induces another to enter into partnership upon the assurance that he shall not be liable to the former for any of the debts of the firm, this will have the effect of limiting the liability of the partner in question to those debts of the firm which are not owing to the person who induced him to become a partner. See Batty v. McCundie, 3 Car. & P. 208; Connop v. Levy, 11 Q. B. 769; Compare Bill v. Richards, 2 H. & N. 311; and see as to the fraud of the plaintiff in getting up a company, Pilbrow v. Pilbrow's Atmospheric Co., 5 C. B. 440. Again, if a person chooses to deal with a partnership or company upon the terms that its funds, and they only, shall be available to make good his demands, he cannot afterward depart from those terms and hold the members individually liable as if no such restriction had been agreed to.[1] Alchorne v. Saville, 6 Moo. 202; Halket v. The Merchant Traders' Loan Assoc., 13 Q. B 960; Hallett v. Dowdall, 18 Q. B. 2; Durham's case, 4 K. & J. 517. It is, however, to be borne in mind that partners, who contend for restricted liability, have the *onus probandi* on themselves, and that if, owing to any circumstance, they fail in establishing their case, the general rule of unlimited liability applies to them as a matter of course. The ordinary mode of restricting liability is to contract that the funds of the company shall alone be liable to the demands against it. Upon contracts in this form, it is to be observed that—

1. A contract by a person to pay out of his own property without limitation is in fact an absolute contract to pay, for *expressio eorum quæ tacite insunt nihil operatur*.

2. Upon the same principle, a contract by a corporation to pay out of its funds is, as regards the corporation, neither more nor less than a contract to pay absolutely, for a corporation as such has nothing except its funds to pay out of. Sunderland Marine Ins. Co. v. Kearney, 16 Q. B. 925, in which the liability of the individual members of the company was not in question.

3. An express contract to pay out of certain funds excludes an implied contract to pay in some other manner. See Giles v. Smith, 11 Jur. 334, C. P.; Landman v. Entwistle, 7 Ex. 632; Mathew v. Blackmore, 1 H. & N. 762; Taft v. Harrison, 10 Ha. 489; compare Cope's case, 1 Sim. (N. S.) 54.

4. But a person who undertakes to pay out of certain funds is absolutely bound to pay if those funds exist and are available; so that, if the funds existing and being available, he does not choose to pay out of them, he must pay out of his own property. Higgins v. Hopkins, 3 Ex. 163; Hallett v. Dowdall, 18 Q. B. 2. But if an incorporated company promises to pay out of its funds only, and it has funds, it does not follow that the shareholders are personally liable. Re The Athenæum Soc. and

[1] Golding v. Vaughan, 2 Chit. 436.

been no defense upon the general issue, but only on a plea in abatement. Therefore, it has been held that under a declaration, charging the defendant in his own right only, the plaintiff may recover one

Prince of Wales Soc., 1 Johns. 80; affirmed 5 Jur. (N. S.) 558.

5. On the other hand, a person who undertakes to pay out of certain funds is under no obligation to pay unless those funds exist, or unless their non-existence is owing to his own willful act, or unless he has also undertaken that they shall exist, in which last case his undertaking amounts to an absolute undertaking to pay, and the qualification as to the funds goes for nothing. See Pilbrow v. Pilbrow's Atmospheric Co., 5 C. B. 440. A contract to pay out of certain funds imposes no obligation to preserve those funds so as to have them available for payment when the time arrives. See King v. The Accumulative Ass. Co., 3 C. B. (N. S.) 151, where a company who had granted policies payable out of its funds, had transferred its business and its property to another company.

In conformity with these principles, it has been held that the promoters of a company are not liable to persons employed by them upon the terms of looking to payment to certain specified funds, and not to the promoters individually, Giles v. Smith, 11 Jur. 334, C. P.; Landman v. Entwistle, 7 Ex. 632; compare Cope's case, 1 Sim. (N. S.) 54; Cullen v. Duke of Queensborough, 1 Bro. C. C. 101, and Horsley v. Bell, id. in the note; S. C., 2 Amb. 770; that upon a contract to pay out of the funds of a joint stock company all those who in point of law are bound by the contract are personally liable to satisfy the demands to which those funds are applicable, if any such funds there be, see Andrews v. Ellison, 6 J. B. Moore, 199; Gurney v. Rawlings, 2 M. & W. 87; Dawson v. Wrench, 3 Ex. 359; Reid v. Allan, 4 id. 326; Hallett v. Dowdall, 18 Q. B. 2 (the judgment on demurrer), but if there are no such funds, then the event on which alone payment has to be made not having arisen, no one is liable to pay See, in addition to the above cases, Durham's case, 4 K. & J. 517; Halket v. The Merchant Traders' Loan and Insurance Association, 13 Q. B. 960; Hassell v. Ditto, 4 Ex. 525; The Worcester Corn Exch. Co., 3 De G. Mc. & G. 180; King v. The Accumulative Assurance Co., 3 C. B. (N. S.) 151, and compare Cope's case, 1 Sim. (N. S.) 54. The latter proposition, however, supposes that the contract is not so framed as (notwithstanding what is said about the funds of the company) to amount to an undertaking to pay at all events. The importance of attending to this point appears from Hancock v. Hodgson, 4 Bing. 269. In that case, the projectors of a mining company purchased a copper and tin mine, and covenanted to pay the purchase-money by quarterly installments out of the funds of the company, but it was provided that in case there should not have been received by the bankers of the company or by the directors for the time being, the deposits or installments due from the several shareholders, so as to enable the directors to pay the purchase-money at the times thereinbefore mentioned, then and in such case the said directors should be allowed a further time to pay such balance, until six months after the time or times when the said quarterly installments became due. Upon this covenant and proviso it was held that the covenantors were personally liable to pay the whole purchase-moneys, although the company had no funds, for that whatever might have been the case without the proviso, that clearly showed that after the expiration of the further period therein mentioned the payment was to be made by the covenantors at all events, whether the company had funds or not. The extent to which partners are liable on contracts, in which it is stipulated that the funds of the company alone shall be answerable, and that no member shall be liable beyond the amount of his share, has been made the subject of much discussion in several recent cases. The difficulty which has to be encountered in dealing with such contracts is, so to construe them as to give effect to the stipulation for limited liability, and at the same time not to deprive the claimant of the only means of redress which the law affords. Where the company is an incorporated company, so that judgment can be obtained against it, and execution on such judgment can be issued against the company, the difficulty is not so great as when the company is, in fact, nothing more than an ordinary partnership. Accordingly, in the case of registered joint-stock companies it has been held that its members are not liable to have execution issued against

demand due from the defendant individually, and another due from him as surviving partner.[1]

Should be declared against as survivor.

SEC. 735. But, although in a declaration against the surviving partner it is not absolutely necessary to state the survivorship, yet, Lord

whom after judgment has been obtained against the company on a contract of the description in question, but that the property of the company is alone liable to make good the demands of the judgment creditor, and this has been held at law even in cases where the subscribed capital had been exhausted but the whole capital had not been paid up. Halket v. The Merchant Traders' Loan and Insurance Association, 13 Q. B. 960; Hassell v. Ditto, 4 Ex. 525; Durham's case, 4 K. & J. 517; re The Athenæum Life Soc., 1 Johns. 80, and 5 Jur. (N. S.) 558, on appeal. The same principle is acted on in equity, except that a court of equity will compel the shareholders ratably to pay up so much of the capital as has not already been subscribed. Talbot's case, 5 De G. & Sm. 386; Durham's case, 4 K. & J. 517; Evans v. Coventry, 2 Jur. (N. S.) 557. But when a court of law has to deal with ordinary partnerships, the only remedy it can afford is by means of a judgment against one or more of the members thereof, and then arises the question for what the judgment must be. If the judgment is joint and for the whole of the plaintiff's demand, any one of the shareholders may be compelled to pay the whole without reference to what he may have paid before or be liable to pay hereafter. If, on the other hand, the judgment is to be several, and as against each shareholder only for so much as he undertook to contribute and has not already contributed, the common law rules of pleading require each shareholder to be sued separately, and to sue each separately would involve the creditor of the company in endless litigation. Whichever way therefore the question is decided, it seems impossible at law to do justice to all parties. At the same time, courts at law have done their best to meet the difficulty, and in the celebrated case of Harlett v. Dowdall, 18 Q. B. 2, in which the whole subject was elaborately discussed, a majority of judges upheld the principle of limited liability and left the creditor to take the consequences of entering into a contract for a breach of which a court of law could afford him no adequate redress. In Hallett v. Dowdall, 18 Q. B. 2, several persons forming an unregistered joint-stock company, and carrying on business under the name of The General Maritime Assurance Company, had granted a policy of insurance headed, The General Maritime Assurance Company, London; Capital, One Million, and in which it was, amongst other things, "declared and agreed by and between the company and the assured that the capital stock and funds of the company should alone be liable to answer and make good all claims and demands whatsoever under or by virtue of the said policy, and that no proprietor of the company should be in anywise subject or liable to any claims or demands, nor be in anywise charged by reason of the said policy beyond the amount of his share or shares in the capital stock of the company, it being one of the original and fundamental principles of the said company that the responsibility of the individual proprietors should in all cases, and under all circumstances, be limited to their respective shares in the said capital stock." The policy purported to be made between the assured and the company and was signed by three directors. An action was brought upon the policy against five of the shareholders of the company, none of whom, however, signed the policy. The declaration alleged that the defendants were shareholders in the company, and, after setting out the policy, averred payment of the premium; that the defendants then became insurers to the plaintiff, and duly subscribed the policy as such insurers; that the plaintiff was interested; that a loss had occurred, and that, although the capital stock and funds of the company had been from the time of the making of the policy, and still were, sufficient to pay the plaintiff, yet the defendants had not paid. To this declaration one of the defendants put in a de-

[1] Richards v. Heather, 1 Barn. & Ald. 29, overruling upon this point Spalding v. Mure, 6 T. R. 363.

Ellenborough observed that it would be more convenient in all cases where a debt accrues from a surviving partner to declare against him accordingly, because it is more convenient to make the forms of dec-

murrer, principally on the ground that the declaration showed no joint contract by the defendants and that the action should have been against each one severally in respect of the shares held by him. By the demurrer it will be observed the averments, and amongst them the averment of a promise by all the defendants, and of sufficiency of funds, were admitted to be true, and it was held, first by the Court of Queen's Bench, and afterward on appeal, that the contract, as stated in the declaration and admitted by the demurrer, was a joint contract by all the defendants to pay the full amount of the plaintiff's claims, and the demurrer was overruled. In the same case, however, another of the defendants pleaded *non assumpsit*, and traversed the averment that there were sufficient funds. The question as to liability, therefore, again arose and had to be decided, not, as before, on the supposition that the facts averred in the declaration were true, but on the evidence adduced on the trial, and which showed that none of the defendants signed the policy; that one of them only was a director of the company; that all the subscribed capital had been expended, but that the whole of the nominal capital had not been subscribed. Lord Campbell, who tried the cause, directed the jury that there was a contract binding on the defendants jointly, and that although the company had no funds in hand, yet in point of law they had available capital stock and funds, for more than sufficient to pay the plaintiff remained not called up. On a bill of exceptions, it was decided by five judges against two that there was no evidence of a joint contract by the defendants to pay the plaintiff, and a *venire de novo* was awarded. It is very difficult, however, to discover what, in the opinion of the court, the real contract amounted to, although it would appear that the majority were of opinion that each shareholder might have been sued separately to the extent of his share of the capital not paid up. The *decision of the court* seems to leave in doubt, 1. Whether the directors who signed the policy were in a different position from the shareholders who did not. 2. Whether, according to the true meaning of the contract, the funds of the company were sufficient to pay the plaintiff, the subscribed capital having been expended, but the nominal capital not having been paid up. 3. Whether the true effect of the contract was not, *under the circumstances proved at the trial*, to deprive the plaintiff of any remedy at law, and to compel him to resort to a court of equity to have the unsubscribed capital called up and applied in payment of the plaintiff's demand. 4. Whether the contract was not inconsistent and unintelligible, and whether the proviso limiting the liability of the shareholders ought not to be ignored altogether, as in Furnival v. Combes, 5 Man. & Gr. 736.

Upon the doubts thus raised the following remarks suggest themselves:

1. The directors who signed the policy signed it only as agents of the company, and could not, therefore, if they did not exceed their authority, be liable either on the policy or otherwise to a greater extent than the other members of the company.

2. The policy stated that the capital of the company was 1,000,000*l*. This, so far as it was not exhausted, was therefore the fund to which, by the terms of the policy, the assured was to look for payment. To hold that he had no claim except against so much of the capital as had been subscribed and was still unexhausted would be to depart from the very terms of the policy, and to limit the liability of each shareholder to even less than his share of what was held out to the public and to the assured as the capital of the company.

Lastly, whether there is or is not any method by which at law a contract of the kind in question can be enforced, it is unnecessary, and therefore wrong, to defeat the intention of all parties by holding the proviso limiting the liability of the shareholders to be repugnant to the rest of the contract and therefore void, for in equity, effect can be given to the proviso as well as to the rest of the contract. If the court had declared that the contract was one with which they could not deal, and that the plaintiff's remedy was in equity only, it could hardly have been said that the intention of any of the parties would have been to any extent defeated, and a precedent for such a decision might have been found in the case of Alchorne v. Saville,

laration subservient to the information of the party charged, and it is certainly more usual to declare on a contract with the deceased partner and the survivors, rather than with the survivors alone.[1] And where A was co-executor with B, and B copartner with C, and B paid into the firm money received by him as co-executor, upon the death of B a declaration in assumpsit for this money was held bad, in which A declared in his own right, and not as surviving executor against C in his own right, and not as the surviving copartner.[2]

Outlawry.

SEC. 736. In an action against two defendants, of whom one only appears or is in custody, the plaintiff may proceed to outlawry against the other and may then declare against the one who has appeared alone, stating the outlawry of the other in the commencement of the declaration.[3] In such case it is not enough to allege that the party was in due manner outlawed, without adding that he was outlawed in that suit.[4] But an allegation that a co-defendant was, by due course of law, outlawed at the suit of the plaintiff in this plea and suit is sufficient without a *prout patet per recordum.*[5]

Non-joinder, matter of abatement only.

SEC. 737. The omission of one of several joint contractors as a defendant in assumpsit being matter of abatement only, if it be not so pleaded, the action proceeds as if the promise had been made exclusively by the party sued on the record.[6] Therefore, where one of two partners becomes bankrupt, and obtains his certificate, and an action is brought against the solvent partner alone, a declaration in which counts upon a promise by the defendant and another, since become a bankrupt and certificated, are joined with counts on promises by the defendant solely, since the other became a bankrupt, will stand good if the defendant omit to plead the joint contract in abatement.

---

6 J. B. Moore, 202, where it was held that there was no remedy at law on a policy by which the funds of a company were appointed to answer all claims against it. That in equity the plaintiff in Hallett v. Dowdall would have succeeded in making the shareholders pay up the unsubscribed capital, and in obtaining satisfaction thereout if such capital proved sufficient, scarcely admits of doubt. Evans v. Coventry, 2 Jur. (N. S.) 557; Lind. on Part. pp. 294–308.

[1] Per Le Blanc, J., 2 Mau. & Selw. 25.
[2] Fitzgerald v. Boehm, 6 Moore, 332.
[3] 2 Chit. Archb. Pr. 934.
[4] Saunderson v. Hudson, 3 East, 144.
[5] M'Michael v. Johnson, 7 East, 50.
[6] Per Gibbs, C. J., Hawkins v. Ramsbottom, 6 Taunt. 179.
[7] Hawkins v. Ramsbottom, 6 Taunt. 179. But per Gibbs, C.J., "I say nothing on the question what would be the case, if, before a judge at *Nisi Prius*, the plaintiff had offered evidence applicable to both demands."

CHAPTER XXX.

OF THE PLEADINGS IN.

SEC. 738. Of pleas in abatement.
SEC. 739. For misnomer.
SEC. 740. Plea should be accurate and certain.
SEC. 741. Plea for non-joinder; what must be stated in.
SEC. 742. How must conclude.
SEC. 743. Plaintiff not allowed to amend.
SEC. 744. Demurrer to plea.
SEC. 745. When plaintiff should reply to plea.
SEC. 746. Effect of finding under issue raised, by plea and replication.
SEC. 747. Of pleas in bar, nature of.
SEC. 748. Release.
SEC. 749. Covenant not to sue.
SEC. 750. Payment or tender.
SEC. 751. Former recovery.
SEC. 752. Joint and several debts.
SEC. 753. Set-off.
SEC. 754. Torts cannot be set off.
SEC. 755. Must be debts due in same right.
SEC. 756. Enough, if rights are essentially the same.
SEC. 757. Demands essentially separate.
SEC. 758. Effect of agreement to sever.
SEC. 759. Court will sometimes order judgments to be set off.
SEC. 760. Infancy, plea of.
SEC. 761. Bankruptcy.
SEC. 762. Joint tort.
SEC. 763. When defense is joint.

Of pleas in abatement.

SEC. 738. Pleas in abatement to the writ are so termed, rather from their effect, than from their being strictly such pleas; for, as oyer of the writ can be no longer craved, no objection can be taken by plea to matter which is merely contained in the writ, but, if the mistake in the writ be carried also into the declaration, or rather if the declaration, which is presumed to correspond with the writ, be incorrect in respect of some intrinsic matter, it is then open to the defendant to

plead in abatement to the writ, and there is no plea to the declaration but in bar.[1]

Misnomer.

SEC. 739. We have seen in what cases the non-joinder of partners as co-defendants ought to be taken an advantage of by plea in abatement. It may here be added that the misnomer of one partner, who is sued jointly with others, can no longer be made available by plea in abatement, but that the defendant who is misnamed may cause the declaration to be amended at the plaintiff's costs, by inserting the right name.[2]

Plea should be accurate and certain.

SEC. 740. As these pleas delay the trial of the merits of the action, the greatest accuracy and precision are required in framing them. They should be certain in every intent and be pleaded without any repugnancy, and must in general give the plaintiff a better writ.[3] It has, therefore, been laid down that if A plead a partnership between himself and B, and, after issue joined, a partnership is proved between A, B & C, this is conclusive against the defendant.[4] And it has been decided that a plea in abatement that the defendant jointly with sixteen others contracted, imports that the defendant jointly with sixteen others and no more contracted, and that if more did contract the plea is bad.[5] And where, before the passing of the act which requires an affidavit as to the parties' residences,[6] the defendant pleaded the non-joinder of four others as jointly liable with himself, and refused upon application to give their residences and additions unless the action were discontinued, the court made the rule absolute for the defendant to deliver such particulars, or in default thereof for setting aside the plea.[7] Moreover, although the defendant may plead in abatement to part of a writ or declaration, and demur or plead in bar to the residue,[8] yet a plea which professes to be an answer to the whole declaration, but which in fact is an answer to part only, is bad. Therefore, where, on a writ of debt for a certain sum the plaintiff declared in the first count for part of it as borrowed by the defendant of the plaintiff; and in a second count for the residue of the sum for interest of money lent by the plaintiff to the defendant, and the defendant

[1] 1 Chit. Pl. 390.
[2] Stat. 3 and 4 Will. 4, c. 42, s. 11.
[3] 1 Chit. Pl. 395.
[4] Per De Gray, C. J., 2 Sir W. Bl. 947.
[5] Godson v. Good, 6 Taunt. 507.
[6] See *infra*, note 8.
[7] Taylor v. Harris, 4 Barn. & Ald. 93; see Newton v. Verbeke, 1 Younge & Jerv. 257.
[8] Godfrey's case, 11 Rep. 45 b.

pleaded in abatement of the writ that "the said sum of money in the said writ mentioned, and thereby supposed to be borrowed from the plaintiff," was borrowed by defendant and others, and not by the defendant separately, the court, on demurrer, held the plea bad, because it answered only the cause of action mentioned in the first count.[1]

Plea for non-joinder, what should be stated in.

SEC. 741. A plea in abatement for the non-joinder of a party who should be a defendant, must aver that the party omitted is still living,[2] and that he is resident within the jurisdiction of the court.[3] It is not necessary to state in the plea where the party is living, no venue being required to such plea;[4] but his place of residence must be stated with convenient certainty in the affidavit verifying such plea.[5]

How must conclude.

SEC. 742. The plea must conclude, as it also usually commences, by praying judgment of the writ and declaration,[6] and that the same may be quashed. And in a plea of non-joinder to the whole of the action it is sufficient to plead in abatement of the writ only and not of the declaration also, but where it is intended to plead in abatement of part of the writ, and the cause of abatement arises from some of the counts of the declaration, the defendant must plead in abatement of both.[7]

Under the 4 Anne, c. 16, an affidavit must be added to every plea in abatement. By the 11th section of that statute it is enacted that no dilatory plea shall be received in any court of record, unless the party offering such plea do by affidavit prove the truth thereof or show some probable matter to the court to induce them to believe that the fact of such dilatory plea is true.

Plaintiff not allowed to amend.

SEC. 743. Where the non-joinder of one of several defendants is truly pleaded, the plaintiff cannot be allowed to amend, even for the purpose of saving the Statute of Limitations.[8] If the plea be true,

[1] Herries v. Jameson, 5 T. R. 553.
[2] 1 Saund. 291 a, note 2.
[3] Stat 3 and 4 Will. 4, c. 42, s. 8.
[4] Neale v. De Garay, 7 T. R. 243.
[5] Stat. 3 and 4 Will. 4, c. 42, s. 8.
[6] Atwood v. Davis, 1 Barn. & Ald. 172.
[7] 2 Saund. 210 c, note 1; Powell v. Fullarton, 2 Bos. & Pul. 420, where see the precedent.
[8] Roberts v. Bate, 6 A. & E. 778; *contra*, Lakin v. Watson, 2 C. & M. 685. Under the practice existing in most of the states the court may, upon application, and generally will permit an amendment as to parties, and will permit the plaintiff to cite in omitted defendants. This is the practice even where there is no statutory provision to that effect, but in many of the states,

the plaintiff must enter a *cassetur*, and, unless barred by the statute, he may commence a fresh action.[1] He, however, may reply, that the party omitted has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors.[2]

Demurrer to plea.

SEC. 744. If the plea be insufficient in point of law, the plaintiff may demur generally;[3] but it is more advisable to demur specially, where the plea is merely informal.[4] If on demurrer to a plea in abatement, or a replication thereto, judgment be given for the plaintiff, it is generally only interlocutory that the defendant answer over;[5] but where the plea in abatement improperly commences or concludes in bar, the judgment may be final.[6] If the judgment be for the defendant, it is that the writ be quashed;[7] but without the defendant prays a particular and proper judgment in abatement, the court are not bound to give the proper judgment upon the whole record, as they would be in the case of pleas in bar.[8] The party who succeeds on the demurrer is entitled to his costs.[9]

When plaintiff should reply to the plea.

SEC. 745. If the plea be untrue in fact, the plaintiff should reply.[10] Thus, in assumpsit, the plaintiff may reply to a plea of non-joinder, that the defendant undertook solely to pay, etc.,[11] or that the promises were not made jointly, etc.; and thereupon issue may be joined.[12] Upon the trial of this issue, in a case where the action had been brought for goods sold and delivered, it was held that the defendant clearaly established his plea in abatement, by showing that a partner-

provision is made by statute for such contingencies. The question as to whether the payment of costs shall be a condition precedent, is one that rests largely in the discretion of the court, and will depend upon the circumstances.

[1] 1 Chit. Pl. 402.

[2] Stat. 3 & 4 Will. 4, c. 42, s. 34.

[3] Mitchell v. Tarbut, 5 T. R. 549; Lloyd v. Williams, 2 Mau. & Sel. 484; Rex v. Shakespeare, 10 East, 83.

[4] 1 Chit. Pl. 404.

[5] 2 Saund. 210, n. 3.; Bowen v. Shapcott, 1 East, 542; Lloyd v. Williams, 2 Mau. & Sel. 484; Wade v. Stiff, 2 Moore & Payne, 26; Com. Dig. Abatement, (I. 14).

[6] Nowlan v. Geddes, 1 East, 634.

[7] Bac. Abr. Abatement (P).

[8] Per Lord Ellenborough, 10 East, 87.

[9] Stat. 3 & 4 Will. 4, c. 42, s. 34.

[10] 1 Chit. Pl. 402; Gibbs v. Merrill, 3 Taunt. 307

[11] Young v. Bairner, 1 Esp. 103; and see Ewer v. Andrews, 3 Barn. & Cres. 146.

[12] Where the plea is that the promises were made jointly with A, and the replication that they were not made jointly with A, on the trial of this issue the defendant begins. Fowler v. Coster, 3 Car. & Payne, 463. But see, *contra*, Robey v. Howard, 2 Stark. 556, where Abbott, C. J., said that the plaintiff ought to begin, since, at all events, it was incumbent on him to prove his damages. See, also, Hare v. Munn, 1 Mood. & Malk. 241. There, an action for money lent was brought against one of the members of a club, and the defendant pleaded in abatement the non-joinder of one hundred and sixty-

ship existed between himself and others, and that the bill of particulars delivered by the plaintiff contained some items furnished by the partnership, though it contained others furnished by the defendant alone.[1] On the other hand, when the defendant, in support of his plea, has shown that a partnership existed at the time of the contract, the plaintiff may invalidate this evidence by showing that the contract was several. Therefore, where, in an action of assumpsit, the defendant pleaded that the promise was made jointly by himself and two others, who were alive; and after the defendant had proved that he had two partners, the plaintiff produced several letters from him, signed in his own name, in which he promised to pay the debt in question, without making any mention of his copartners, who were, in fact, resident in America. Lord Ellenborough held the letters conclusive evidence that the debt was due from the defendant individually, and not from the partnership, and the plaintiff had a verdict for the amount of his demand.[2] And where an action was brought against one defendant, who pleaded a similar plea, it was held that an account kept by the defendant only, in a pass-book between him and the plaintiff, at the bankers of the former, was strong evidence to show that the credit was given to the defendant alone.[3] In like manner, the plaintiff may support his case under this issue, by showing that the defendant has made himself separately liable for a demand originally joint.[4]

Effect of finding under the issue raised by plea and replication.

SEC. 746. If the issue be found against the defendant, final judgment shall be against him for the delay,[5] but if the defendant is able to prove his plea, the plaintiff may be nonsuited,[6] and the defendant is entitled to costs.[7] We have already seen, incidentally, that it may be advisable for a plaintiff, after a plea in abatement for non-joinder of defendants, not to proceed to trial on an issue thereon, but to commence a fresh action against the defendants named in the plea, together with the original defendants. In cases of this nature the

---

three persons, members of the club, the plaintiff's evidence being stated to be that he had refused to lend the money on the credit of the club and that the defendants had thereupon consented to make themselves personally liable. Lord Tenterden allowed the plaintiff's counsel to begin. But in this case the defendant's counsel did not object.

[1] Colson v. Selby, 1 Esp. 452.
[2] Murray v. Somerville, 2 Camp. 99, n.
[3] Robey v. Howard, 2 Stark. 555.
[4] Ex parte Ross, Buck, 125.
[5] Com. Dig. Abatement (I. 15); 1 East, 544.
[6] Colson v. Selby, *supra*.
[7] Garland v. Exton, 1 Ld. Raym. 992; and see 1 Salk. 194.

proper commencement of the declaration is set forth in the general rules of Hilary Term, 1834.[1]

Of pleas in bar — nature of.

SEC. 747. Partners may plead in bar of an action against them all such matters as arise from the joint nature of their obligations; and it may here be remarked that since the rules of Hilary Term, 1834, a special plea will be necessary in a great variety of cases where formerly a plea of the general issue would have sufficed. Thus, in actions upon bills of exchange and promissory notes, a plea of *non assumpsit* is no longer admissible. In such actions a plea of denial must traverse some matter of fact, as the drawing, or making, or indorsing, or accepting, etc. And where the plea of *non assumpsit* is admissible, it operates only as a denial in fact of the express contract or promise alleged, or the facts from which the contract or promise may be implied. All matters in confession and avoidance, both in *assumpsit* and debt, must be specially pleaded; that is to say, not only matters by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise; as, for instance, infancy, coverture, release, payment, performance, illegality of consideration, drawing, etc., bills by way of accommodation, set-off, mutual credit, etc. And although in actions of debt on simple contract, except on bills of exchange and promissory notes, the defendant may plead "that he never was indebted in manner and form as in the declaration alleged," this operates only in the same manner as the plea of *non assumpsit*, in *indebitatus assumpsit;* and the plea of *nil debit* is not allowed in any action. To this may be added that in debt on specialty or covenant the plea of *non est factum* operates only as a denial of the execution of the deed in point of fact.

Release.

SEC. 748. We have seen that a release to one of several partners inures to the benefit of all.[2] A release, therefore, to one of several

[1] Rule 20.

[2] But this is not so in those States where, by statute, it is provided that a release of one joint debtor shall not discharge the whole, as in Vermont and several of the States, nor in those States where by statute partnership debts are made joint and several. Evans v. Carey, 29 Ala. 99; Gardner v. Baker, 25 Iowa, 343. But by agreement, express or implied, that a release of one shall operate as an extinguishment of the debt, would of course have that effect in any of the States. Where no such statute exists, a release of one partner may operate as a release of all, even though it is expressly provided therein that it shall not have that effect. Brown v Marsh, 7 Vt. 327; Wiggin v. Tudor, 28 Pick. (Mass.) 444; Gray v. Brown, 22

partners, may be pleaded in bar of an action of debt against the firm, either on a joint,[1] or joint and several bond.[2] It may also be pleaded in bar of an action of *assumpsit*.[3] But if the defendant plead a

Ala. 262; Bosson v. Kincaid, 3 Penn. St. 57. But it is held that the release must be under seal. Lunt v. Stevens, 24 Me. 534; Shaw v. Pratt, 22 Pick. (Mass.) 305; Zeng v. Bailey, 9 Wend. (N. Y.) 336; but it is not believed that this technical requirement is now regarded as indispensable, but that an actual release, whether under seal or by parol, is sufficient.

Release.—"Both at law and in equity," says Mr. Lindley, vol. 1, p. 351, "a release of one partner from a partnership debt discharges all the others." Bower v. Swadlin, 1 Atk. 294; Ex parte Slater, 6 Ves. 146; Cheetham v. Ward, 1 Bos. & P. 630; Cocks v. Nash, 9 Bing. 341, for where several persons are bound jointly, or jointly and severally, a release of one is a release of them all. See the last note, and as to joint and several obligations, Co. Lit. 232, a; Lacy v. Kinaston, 1 Ld. Raym. 690; Kiffin v. Evans, 4 Mod. 379. But in this respect a covenant not to sue differs from a release, for, although where there is only one debtor and one creditor, a covenant by the latter never to sue the former is equivalent to a release, it has been decided on several occasions that a covenant not to sue does not operate as a release of a debt owing to, or by other persons besides those who are parties to the covenant. Clayton v. Kinaston, 2 Salk. 573; Lacy v. Kinaston, 1 Ld. Raym. 688, and 2 Salk. 575; Hutton v. Eyre, 6 Taunt. 289; Dean v. Newhall, 8 T. R. 168; Walmsley v. Cooper, 11 A. & E. 216; and see Price v. Barker, 4 E. & B. 760; Couch v. Mills, 21 Wend. (N. Y.) 424; Mason v. Jonett, 2 Dana (Ky.), 107; Goodnow v. Smith, 18 Pick. (Mass.) 416; McClellan v. Cumberland Bank, 24 Me. 566. If a release is so drawn as to show beyond all doubt that it was intended to inure only for the benefit of the releases personally, and not to avail even him in an action by the releasor against the releasee, jointly with other people, then persons jointly liable with him in respect of the debt released will not be discharged therefrom. In such a case the deed will itself show that it was not in fact intended to operate as a release. In Solly v. Forbes, 2 Brod. & Bing. 38, the defendants, Forbes and Ellerman, were partners, and were indebted to the plaintiffs, and had stopped payment. In consideration of a sum paid by Ellerman, the plaintiffs released him from all further demands, but it was declared in the release (to which, however, Forbes was not a party) that nothing therein contained should affect the plaintiffs' rights against Forbes, either separately or as partners with Ellerman, or against the joint estate of the two, and that it should be lawful for the plaintiffs to sue Ellerman, either jointly with Forbes, or separately, for the purpose of obtaining satisfaction of their debt, either out of the joint estate of the two, or from Forbes. In an action brought by the plaintiffs against Forbes and Ellerman to recover the debt owing by them, it was held that this deed was no bar to the action. Price v. Barker, 4 E. & B. 760; see, too, Thompson v. Lace, 3 C. B. 540; Wills v. De Castro, 4 C. B. (N. S.) 216, is a decision on a similar deed, and is to the same effect. Again, in Hartley v. Manton, 5 Q. B. 247, where a bill was drawn by a firm on, and was accepted by, one partner, it was held that a release of the drawers did not discharge the acceptor, the object of the release being to discharge the joint liability of the firm, but not to affect the several liability of the accepting partner. In construing releases, particular attention must be paid to the recitals, for, however general the operative words of the deeds may be, they will be confined so as not to affect more than the parties appear from the deed itself to have contemplated. See, for illustrations of this rule, Lindo v. Lindo, 1 Beav. 496; Payler v. Homersham, 4 M. & S. 423; Simons v. Johnson, 3 B. & Ad. 175; Boyes

[1] Com. Dig. Pleader (2 W. 30); Vin Abr. Release, G. a; Co. Litt. 232, a, even although the obligee release to one, "provided that the other shall not take the benefit of it." Litt. Rep. 190. But this seems very questionable.

[2] Com. Dig. Pleader (2 W. 30); Clayton v. Kynaston, Salk. 574; D. Holroyd, J., Burleigh v. Stott, 2 Man. & Ryl. 93. Where a covenant is joint and several a release of the action to one shall not be a bar as to the other. Com. Dig. Pleader (2 V. 11); 2 Salk. 574. *Sed qu.*

[3] Solly v. Forbes.

release, and the release is in fact limited in its operation, and not inconsistent with the plaintiff's right to sue the defendant for a particular purpose, the plaintiff may crave oyer of the release, and aver in his replication that he is suing for the purposes stated in the release.[1]

---

v. Bluck, 13 C. B. 652; Lampton v. Corke, 5 B. & Ald. 606. If several persons are bound by a bond jointly, or jointly and severally, and their creditor removes the seal of one of them from the bond, all the others are discharged; but if the obligors are only bound severally, and in no sense jointly, then the removal of the seal of one of them does not affect the liability of the others. See Collins v. Prosser, 1 B. & C. 682. An arrest of a debtor, followed by discharge of him by the arresting creditor, is equivalent to a release by the latter of his debt, whence it follows that if a creditor of a firm obtains judgment against it, and arrests the partners, and then lets one of them go, the others are entitled to be discharged from custody. Ballam v. Price, 2 Moo. 235.

Substitution of debtors and securities.— A liability, which is originally joint and several, may be extinguished by being replaced by a liability of a different nature, and this may happen in one of two ways, viz., either by an agreement to that effect come to between the parties liable and the person to whom they are liable, or by virtue of the doctrine of merger, independently of any such agreement.

Of substitution by agreement.— In order that one liability may be extinguished by being replaced by another by agreement, it is essential that the person in whom the correlative right resides should be a party to the agreement, or should, at all events, show by some act of his own that he accedes to the substitution. If A, being indebted to B, transfers his liability to C, and B does not assent to the transfer, his rights are wholly unaffected, he will never acquire any right against C nor lose his former right against A. As regards B, the agreement between A and C is *res inter alios acta*, and it does not in any way benefit or prejudice him. But if B assents to the arrangement come to between A and C, and adopts C as his debtor instead of A, then A's liability to B is at an end, and B must look for payment to C, and to him alone. See per Buller, J., in Tatlock v. Harris, 3 T. R. 180. To apply this to cases of partnership, let it be supposed that a firm of three members, A, B, and C, is indebted to D, that A retires, and B and C, either alone, or together with a new partner, E, take upon themselves the liabilities of the old firm. D's right to obtain payment from A, B and C is not affected by the above arrangement, and A does not cease to be liable to him for the debt in question. But if, after A's retirement, D accepts as his sole debtors B and C, or B, C and E (if E enters the firm), then A's liability will have ceased and D must look for payment to B and C, or to B, C and E, as the case may be. When, therefore, a partner has retired and a creditor of the firm continues to deal with the continuing partners and such other persons, if any, as may have become associated with them in partnership, it is of great importance to ascertain whether the creditor has or has not accepted the new firm as his debtors in lieu of the old firm. If he has, the retired partner's liability will have ceased, whilst, if he has not, it will still continue. Nothing is more common than for promoters of companies to put forward a prospectus in which it is said that all liability on the part of a shareholder will cease on a transfer of his share, but the hope thus held out is as false and delusive as that intended to be raised by the assertion that the liability of the shareholders will be limited to the amount of their shares. See Blundell v. Winsor, 8 Sim. 613. It cannot be too often repeated that, merely by retiring, a partner or a shareholder gets rid of no liability as to past transactions, unless there is some statutory enactment applicable to his case, and the same observation applies to a total dissolution. To use the words of Mr. Justice Heath, "when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future. With regard to things past, the partner-

---

Id. And see Payler v. Homersham, 4 Mau. & Sel. 423; Simons v. Johnson, 3 B. & Ad. 175.

Covenant not to sue.

SEC. 750. Where the obligee has covenanted with a sole obligor not to sue him, there, to prevent circuity of action, the covenant may be pleaded *qua* a release to an action on the bond.[1] But a distinction is taken between a covenant not to sue a sole obligor, and a covenant

ship continues, and always must continue." Wood v. Braddick, 1 Taunt. 104. Therefore, partners continue liable on the covenants entered into by them in a lease of the partnership premises, although the firm may have been dissolved since the lease was granted. See Hoby v. Roebuck, 7 Taunt. 157; Graham v. Wichelo, 1 Cr. & M. 188. Moreover, although the partners themselves may agree that on the retirement of one of them the others shall take upon themselves all the debts and liabilities of the old firm, such an agreement in no way affects the creditors, it is a mere contract of indemnity; see Rogers v. Maw, 4 Dowl. & L. 66; valid, indeed, as among the parties to it, but not in any way varying the rights of others, as to whom it is *res inter alios acta*. A good illustration of this is afforded by Smith v. Jameson, 5 T. R. 601. See, too, Dickenson v. Lockyer, 4 Ves. 36; Cummins v. Cummins, 8 Ir. Eq. 723. There the two defendants were partners; one of them, with the privity of the other, improperly carried some trust moneys to their joint account, thereby incorporating them with the partnership assets. Afterward, on a dissolution of partnership, the partnership assets were assigned to the first partner, and he took upon him the debts of the firm, but this was held in no way to alter, as against the *cestui que trust*, the liability of both partners to make good the trust moneys. Turning now to those cases which bear upon the question of discharge by virtue of a substitution by a creditor of one debtor for another, it will be found that notwithstanding some conflict between them they are all professedly based on a few simple principles, the most important of which are as follows:

1. There is no *a priori* presumption to the effect that the creditors of a firm do, on the retirement of a partner, enter into any agreement to discharge him from liability.

2. An agreement by a creditor of several persons, liable to him jointly, to discharge one or more of them and look only to the others, is not necessarily invalid for want of consideration, for in some respects the security of one person liable solely is, or, at all events, may be preferable to the security of that same person if only liable jointly with others, *e. g.*, in case of bankruptcy or death. See per Parke, Baron, in Kirwan v. Kirwan, 2 Cr. & M. 617. If, therefore, one partner retires, and a creditor of the old firm goes on dealing with the continuing partners, it is for the jury to say whether, in point of fact, the creditor abandoned the security of the retired partner and looked only to the continuing partners; and if the jury find in the affirmative, the court will not disturb the verdict on the ground that the abandonment cannot be sustained in point of law for want of consideration to support it. Thompson v. Percival, 5 B. & Ad. 925, correcting Lodge v. Dicas, 3 B. & Ald. 611, and David v. Ellice, 5 B. & C. 196.

3. Except under special circumstances, a creditor who discharges one partner discharges all. Consequently, if a creditor discharges a retired partner, and acquires no new right to obtain payment from the others, either alone or with a new partner, the creditor will be altogether remediless. One test, therefore, by which to determine whether a retired partner has been discharged is, to see whether the creditor has obtained a new right to demand payment, for if he has not, no discharge can possibly be made out by any evidence which fails to establish an extinguishment of the creditor's demand altogether."

[1] Ayliff v. Scrimshire, 1 Show. 46; Smith v. Mapleback, 1 T. R. 446. An agreement or covenant not to sue one partner or the firm cannot be set up as a release. Wormsley v. Cooper, 3 P. & D. 149. Thus, in Roberts v. Strong, 38 Ala. 567, the plaintiff, upon consideration of personal security given by one of the partners for a portion of the debt, covenanted not to sue him thereon for twenty years. The court held that this did not discharge the other partner, nor operate as an extinguishment of his liability, except to the extent of the amount assumed by the other partner.

not to sue one of several obligors.[1] Thus, if A is bound to B, and B covenants never to put the bond in suit against A; if, afterward, D sue on the bond, A may plead the covenant by way of release. But if A and B be jointly and severally bound to C in a sum certain, and C covenants with A not to sue him, that shall not be a release, but a covenant only; because he covenants only not to sue A, but does not covenant not to sue B, for the covenant is not a release in its nature, but only by construction, to avoid circuity of action. He may sue the other, because he might without this covenant sue one of them without the other.[2] And the case of Lacy v. Kynaston was followed in that of Dean v. Newhall,[3] before Lord Kenyon, where it was held that, to an action against one of two obligors in a joint bond, the defendant could not plead, by way of release, a covenant by the plaintiff not to sue his co-obligor. It follows, from these cases, that if, after a covenant not to sue one partner, the plaintiff enforces judgment against all, the covenantee must bring his action on his covenant, for he cannot plead the covenant in bar.[4]

Payment or tender.

SEC. 750. Payment by one of two partners may be pleaded as payment by both. So a tender by one of two partners may be pleaded as a tender by both. But, after a tender of what is due from two persons on a joint contract, a subsequent application to one of them is sufficient to support a replication to a plea of tender, that the plaintiff subsequently demanded payment from the defendants.[5]

---

[1] Hutton v. Eyre, 1 Marsh. 608. D. Holroyd, J., Thomas v. Courtnay, 1 Barn. & Ald. 8.

[2] Lacy v. Kynaston, 12 Mod. 551; 1 Ld. Raym. 690. A deed *inter partes* cannot operate as a release to strangers. Storer v. Gordon, 3 Mau. & Sel. 308.

[3] 8 T. R. 168.

[4] See 1 Marsh. 608; Dowes v. Jeffries, And. 307; Turner v. Daveis, 2 Wms. Saund. 150, note 2.

[5] Peirse v. Bowles, 1 Stark. 321. The taking of the security of one partner, under an agreement express or implied, to discharge the other partners, discharges them from the debt. Robinson v. Hurlburt, 38 Vt. 463; Millard v. Thorne, 56 N. Y. 402, or the taking of a higher security from one partner as a bond. Low v. Goodrich, 2 Johns (N. Y.) 214; Ward v. Johnson, 13 Mass. 150; Williams v. Hodgson, 2 H. & J. (Md.) 474; Patterson v. Brewster, 4 Edw. Ch. (N. Y.) 352; Waugh v. Carriger, 1 Yerg. (Tenn.) 81; United States v. Astley, 3 Wash. (U. S. C. C.) 512; McNaughton v. Partridge, 11 Ohio, 223. So where money is borrowed or goods purchased by one partner, of one who knows of the partnership and understandingly gives credit to him alone, he cannot subsequently pursue the firm for the debt. Ross v. Lawton, Dudly (S. C.), 360; Dispatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 234. But it may undoubtedly be shown that such was not the intention or agreement of the parties, from the circumstances attending the transaction. Collier v. Leech, 29 Penn. St. 404; Wallace v. Fairman, 4 Watts (Penn.), 378. In Stone v. Chamberlain, 20 Ga. 262, one of the partners, after dissolution, gave his own note for a firm debt, and it was held a payment as to the other partners, and the same doctrine was held in Evans v. Drummond, 4 Esp. 89. In Le Page v. McCrea, 1 Wend. (N. Y.) 172, the mem-

Former recovery.

SEC. 751. A former recovery for the same debt may be pleaded by partners, though the recovery was against one only. But it must be shown by the plea that the plaintiff took the fruits of that recovery in satisfaction of the joint debt. Therefore, where one of three joint covenantors gave a bill of exchange for part of a debt secured by the covenant, on which bill judgment was recovered, such judgment was held to be no bar to an action of covenant against the three; the defendants, though they averred in their plea that the bill was given for payment and in satisfaction of the debt, omitting to aver that the bill had been accepted as satisfaction, or had in fact produced satisfaction.[1] Where an action is brought against some of the partners of a firm, and the defendants recover a verdict, and afterward a new action is brought agains the other partners for the same demand, they may plead the former judgment in answer to the action; because otherwise, if a verdict should be recovered against the latter partners, they might call on their copartners for contribution, and the latter

bers of a firm made an assignment for the benefit of creditors, and the plaintiff agreed to and did receive the note of a third person for a sum less than the firm owed him, in full discharge thereof, and the court held that the taking of the note under the circumstances was a valid accord and satisfaction. See, also, Glasgaw v. Hobbs, 32 Ind. 442. So the liability of the firm as such may be discharged by the creditor accepting the individual note of each member for his share of the debt. Crocker v. Crocker, 52 Me. 169; Maxwell v. Day, 45 Ind. 509. So when a creditor, knowing of the dissolution of the firm, and the formation of a new one, accepts the note of the new firm for a debt due from the old, or even the note of one partner who continues the business. Townsend v. Stevenson, 4 Rich. (S. C.) 59. At least it is for the jury to say whether the new note was not taken in discharge of the debt against the old firm. Thompson v. Percival, 3 N. W. & N. 167. In Ohio, in Leach v. Church, 13 Ohio St. 172, and in an earlier case, Merrick v. Bussy, 4 id. 68, it was held that in order to have that effect it must appear that it was agreed to take the new note in discharge, and that from the mere fact that it was taken such an inference could not be drawn. A similar doctrine is held in Kentucky, Sneed v. Wiester, 2 A. K. Marsh. (Ky.) 277; in Missouri, Yarnell v. Anderson, 14 Mo. 619; Pennsylvania, Mason v. Wickersham, 4 W. & S. (Penn.) 101, and Maine, Chase v. Vaughn, 30 Me. 413. While the partnership is on foot, the mere taking of the note of one partner for a firm debt does not, in the absence of an express agreement, discharge the other partners. Davis v. Desanque, 5 Whart. (Penn.) 531; Thompson v. Briggs, 28 N. H. 40; Folk v. Wilson, 21 Md. 549; Van Epps v. Dillaye, 6 Barb. (N. Y.) 252; Schallenberger v. Seldonridge, 49 Penn. St. 85; Williams v. Donaghue, 6 Munf. (Va.) 304; Arnold v. Camp, 12 Johns. (N. Y.) 409; Wilson v. Jennings, 15 N. C. 94. But an agreement to accept it in discharge, particularly if the other partners have in good faith acted upon the agreement and accounted to the other partner for their share of the debts, is obligatory. Robinson & Church v. Hurlburt & Miller, 38 Vt. 463. See cases cited *ante*. But a mere agreement to look to one partner for a firm debt is not obligatory, being without consideration. Lodge v. Dicas, 3 B. & Ald. 611. Nor does the taking of a mortgage from one partner, unless agreed to be in discharge. Pierce v. Cameron, 7 Rich. (S. C.) 414; Fulton v. Williams, 11 Cush. (Mass.) 108. See, holding that the taking of note of one partner after dissolution, under an agreement to discharge the firm, is obligatory, Niday v. Harvey, 9 Gratt. (Va.) 469.

[1] Drake v. Mitchell, 3 East, 251; and see Higgins' case, 6 Rep. 46 a; Ashbrooke v. Snape, Cro. Eliz. 240.

would thus be made circuitously to pay the plaintiffs after having obtained a verdict in the action brought directly against them.[1]

Joint and several debts.

SEC. 752. Where a debt is several as well as joint, as in the case of a joint and several bond or promissory note, judgment recovered against one of the joint debtors will be no bar to an action against the other. But it should seem that where the debt is joint only, a judgment against one joint contractor would be a bar to an action against another; because the latter might plead that he made no promise, except with the former.[2]

Set-off.

SEC. 753. Another matter which the partners may now plead in bar of an action, and which indeed, they must plead,[3] although formerly

[1] See arg. Wilson v. Hirst, 4 B. & Ad. 763.

[2] See Lechmere v. Fletcher, 1 C. & M. 639.

[3] Grahani v. Partridge, 5 Dowl. Pr. C. 108.

Of set-off by and against partnerships. — The right of setting one claim against another appears only to exist at common law, where a person seeks to avail himself of a lien on goods in his possession, but of which he is not the owner. But, by statute, if two persons are indebted to each other, and either sues the other for the debt owing by him, the defendant can plead, by way of set-off, the debt due to him from the plaintiff. The statute in question declares "that where there are mutual debts between the plaintiff and the defendant, or if either party sue or be sued, as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other." 2 Geo. II, c. 22; and see 8 id. 24, as to setting off simple contract debts against specialty debts; and see generally 3 Chitty's Statutes, 1025, and Chitty on Contracts. The statute, it will be observed, only mentions mutual debts, and this expression has been held to be confined, first to debts in the narrow sense of the word, *i. e.*, definite and ascertained sums of money, owing by each party to the other, see Castelli v. Boddington, 1 E. & B. 66 and 879 · Attwooll v. Attwooll, id. 23; Luckie v. Bushby, 13 C. B. 864; and Hutchinson v. Sydney, 10 Ex. 438, and, secondly, to debts owing to and by each party in one and the same capacity; See Hutchinson v. Sturges, Willes, 261; Watts v. Reese, 9 Ex. 696, and 11 id. 410; Mardall v. Thelusson, 6 E. & B. 976. It follows from the last proposition that a debt owing to a firm of partners cannot (except by the consent of all parties, see Kinnerly v. Hosack, 2 Taunt. 190; Cheetham v. Crook, McLel. & Y. 307; Vulliamy v. Noble, 3 Mer. 618, or under special circumstances) be set off against a debt owing by one of its members, or *vice versa*. It scarcely requires to be pointed out that to allow a set-off of such debts would be to enable a creditor to obtain payment of what is due to him from persons in no way indebted to him. As a rule, therefore, a debt owing by one of the members of a firm cannot be set off against a debt owing to him and his copartners, Gordon v. Ellis, 2 C. B. 821; France v. White, 8 Scott, 257; nor can a debt owing to one of the members of a firm be set off against a debt owing by him and his copartners. Arnold v. Bainbridge, 9 Ex. 153; M'Gillivray v. Simson, 2 Car. & P. 320; Boswell v. Smith, 6 id. 60. And this rule applies even where one partner only has been dealt with, and the debts sought to be set against each other are a debt owing by him, and a debt owing to him and others, but arising out of transactions with him alone. This last point is well illustrated by the recent case of Gordon v. Ellis, 2 C. B. 821, and see the same case, 7 Man. & Gr. 607, where it will be observed the plea was materially different. There an action was brought by three partners, for the

they might have given it in evidence under the general issue, is that of set-off. As the rules of law regarding set-off are equally applicable, whether the action be brought by or against partners, the observations which follow are directed to either of these cases.

---

recovery from the defendant of money received by him for goods of the plaintiffs sold by the defendant on their account. The defendant pleaded in effect, that he had been employed by A only; that A sent the goods for sale as if they were his own; that the goods were sold by the defendant as A's goods, and that A was indebted to the defendant in a larger amount than that sought to be recovered in the action. It was admitted, that if B and C had by their conduct induced the defendant to believe that A was the sole owner of the goods in question, and to deal with A on that supposition, the defendant would have had a good defense to the action; but it was held that, as the defendant did not allege that such had been the case, his plea was a mere attempt to set off a debt due from one member of the firm against a debt due to the firm itself, and was bad. To the general rule which precludes the set-off of a debt due to a firm against a debt owing by one of its members, and *vice versa*, there are, however, a few exceptions. The first is, where one partner has rendered himself, or has become, by having survived his copartners, the only person capable of suing or of being sued in respect of the demand which forms the subject-matter of the action. For example, if a joint and several promissory note is made by partners, and one of them sues the payee for some separate demand, the defendant can set off the note; for *ex hypothesi*, it is the several note of the partner suing him, see Owen v. Wilkinson, 5 C. B. (N. S.) 526. So, if a covenant is entered into by one partner only, he can, in an action against him on the covenant, set off a debt due to him alone from the plaintiff; and if one partner only is covenanted with, and he sues upon the covenant, the defendant may plead, by way of set-off, a debt due to him from the plaintiff in his separate capacity. See Fletcher v. Dyche, 2 T. R. 32. In such a case the partner who is party to the deed is the only legal debtor or creditor, as the case may be, and he is treated accordingly for all the purposes of an action on the deed. Again, when a partner survives his copartners, he alone can sue and be sued at law in respect of debts owing to or by the late firm; and it has been held that, in an action against a surviving partner for the recovery of a debt owing by him, but not as partner, he can set off a debt owing by the plaintiff to him as surviving partner, Slipper v. Sidstone, 5 T. R. 493; Golding v. Vaughan, 2 Chitty, 486, and that, in an action by a surviving partner for a debt due to him in his own right, the defendant can set off a debt owing to himself by the plaintiff as surviving partner. French v. Andrade, 6 T. R. 582. In deciding these cases, it is submitted that courts of law have too closely adhered to technical rules of pleading, and have not paid sufficient attention to the fact that the partner suing or sued is in truth a trustee for himself and others. If it be said that prior to the Common-Law Procedure Act, 1854, courts of law always ignored trusts, the answer is twofold, viz., first, that in some cases courts of law did allow a person to sue as a trustee for others when he could not have sued in any other character, Winch v. Keeley, 1 T. R. 619; Castelli v. Boddington, 1 E. & B. 66; and secondly, that as regards set-off, courts of law did recognize the justice of the rule that mutual debts could not be set off unless they were owing to and by the same person in the same capacity. It need scarcely be observed that equity does not follow the law in such cases as those here alluded to. A second exception to the rule in question, and one as little satisfactory as that last noticed, arises from the doctrine which precludes a joint action by several persons if one of them has deprived himself of his right to sue. In accordance with this doctrine it has, in effect, been held that if a partner, being indebted to a person who is indebted to the firm, agrees with him that the one debt shall be set off against the other, and the two settle their accounts together on this footing, the firm is bound by this transaction, and the debt owing to it extinguished. Wallace v. Kelsall, 7 M. & W. 264. See Nottidge v. Prichard, 2 Cl. & Fin. 379. This is certainly going very far; for, first, a general authority to receive payments of debts does not include an authority to settle them in any other

At the common law, if the plaintiff was indebted to the defendant in as much, or even more than the defendant owed to him, yet the defendant had not any method of setting off such debt in the action

mode, see Young v. White, 7 Beav. 506; Underwood v. Nicholls, 17 C. B. 239, and Story on Agency, § 98: and, secondly, the implied authority of every partner to bind the firm can hardly be held to justify him in paying his own debt with his partners' money if his creditor is aware that this is being done. Indeed it is clear that there is no such implied authority. See Shirreff v. Wilks, 1 East, 48. Where a debt to a firm has been contracted in dealings with one partner alone, and the debtor to the firm believes that he is debtor only to the partner with whom he has dealt, it might perhaps have been held to be competent for the debtor and that partner to set against the debt thus contracted, another debt due from the partner in question to the debtor in question, and to bind the firm by that arrangement. Upon principle indeed it would be difficult to go so far as this, unless the other partners had by their conduct induced the belief that their copartner was acting for himself alone. But even if it were otherwise, such a case would fall far short of Wallace v. Kelsall, 7 M. & W. 264, where it was held that a debtor to a firm, knowing himself to be such, can at law get rid of his liability to the firm by discharging a debt due to himself by one only of the members of that firm. The case is not, it is conceived, supportable on any other doctrine than that noticed above, and cannot be considered as an instance illustrating any branch of the law of agency. The third exception to the general rule under consideration is supported as well by reason as authority, and occurs where one partner has been allowed by his copartners to act as if he were principal and not an agent of the firm. It has been seen that dormant partners may join their copartners in suing on contracts entered into in form with the latter only. But dormant partners cannot, by coming forward and suing on such contracts, deprive the defendant of any right of set-off which he might have availed himself if the non-dormant partners only had been plaintiffs. This was held by Lord Kenyon in Stacey v. Decy, 7 T. R. 361, note, and 2 Esp. 469. See, too, Teed v. Elworthy, 14 East, 213, where the plaintiffs, Stacey, Ross, and others, were in partnership as grocers, and Ross was the only person who appeared to the public as concerned in the partnership business. The defendant had dealt with Ross, and had become indebted for groceries supplied by him. On the other hand, the defendant had expended money for Ross, and had done so on the supposition that the moneys thus expended could be set off against what was due for the grocery. The plaintiffs, however, contended that this set-off could not be made, but Lord Kenyon held that as the defendant had a good defense by way of set-off against Ross, and had been by the conduct of the plaintiffs led to believe that Ross was the only person he contracted with, they could not pull off the mask and claim payment of debts supposed to be due to Ross alone, without allowing the defendant the same advantages and equities in his defense as he would have had in an action brought by Ross solely. See George v. Clagett, 7 T. R. 359. In this case, all the partners except Ross were dormant, and by the terms of the agreement into which all had entered, Ross alone was to be the apparent trader. His copartners were therefore simply in the position of undisclosed principals, and were treated accordingly by the court. In Gordon v. Ellis, 2 C. B. 821, which has been before referred to, an attempt was made to extend the principle on which Lord Kenyon decided Stracey v. Decy to all cases in which one partner only transacts the business of the firm, and becomes himself indebted to the person with whom he deals. But it was held, and it is conceived rightly, that a person liable to be sued by a firm cannot set off a debt due from one only of its members, on the ground that he only was dealt with by the defendant, unless it can be shown that the other members of the firm induced the defendant by their conduct to treat their copartner as the only person with whom the defendant had to do. See Baring v. Corrie, 2 B. & Ald. 137. But here again it is to be observed that if the debt due from one partner can be treated as due from the firm, that debt may be set off against another debt due to it. This is illustrated by the same case of Gordon v. Ellis, 7 Man. & Gr. 607, where, in an action by a firm for money due to it from the defendant for goods of the firm sold by him, the latter was held entitled to set off a debt due to

brought by the plaintiff for the recovery of his debt.[1] To obviate this inconvenience, and to prevent circuity of action, or a bill in equity, it was enacted by statute 2 Geo. 2, c. 22, s. 13, that "where there are

him for an advance made by him to one of the partners on account of those goods. The court thought that, although the money was advanced to one partner only, the defendant had a right to treat it as an advance to the firm made on that partner's requisition whilst acting within the scope of his apparent authority as agent of the firm. In point of fact, the defendant, instead of waiting until he had sold the goods, and then handing over the money produced by their sale, made a payment on account, and he sought nothing more than to have the amount so prepaid deducted from the sum for which he sold the goods.

It sometimes happens that, in order to avoid a plea of set-off, a plaintiff who is indebted to a firm sues one of its mem-

[1] Selwyn's N. P. 573. See, also, D. Littledale, J., May v. Brown, 3 Barn. & Cres. 134. A judgment against one partner, whether he is a real or merely an ostensible partner, discharges the firm. Peters v. Sandford, 1 Den. (N. Y.) 224; Spear v. Gillett, 1 Dev. Eq. (N. C.) 466; Thompson v. Emmert, 17 Ill. 415; Gibbs v. Bryant, 1 Pick. (Mass.) 118; Smith v. Black, 9 S. & R. (Penn.) 142; Willings v. Consequa, 4 Johns. Ch. (N. Y.) 566; Trafton v. United States, 3 Story (U. S. C. C.), 698; Bell v. Banks, 3 M. & G. 267; Olmstead v. Webster, 8 N. Y. 414; Ward v. Matter, 2 Robt. (Va.) 536; National Bank v. Sprague, 20 N. J. 31; Suydam v. Barber, 6 Duer (N. Y.), 34; Lewis v. Williams, 6 Whart. (Penn.) 264; United States v. Cushman, 2 Sum. (U. S.) 437; Anderson v. Swan, 1 W. & S. (Penn.) 334; Pearce v. Kinney, 5 Hill (N. Y.), 82; Simonds v. Center, 6 Mass. 18. Such former recovery should be plead in bar, and not in abatement of the action. King v. Hoare, 13 M. & W. 494. This is the first English case in which a former recovery against one joint debtor was held to discharge the other. In the case cited by the author this doctrine was intimated, but the question was not actually before the court. In such a case a court of equity will not release the creditor against the effect of the judgment. Pinny v. Martin, 4 Johns. Ch. (N. Y.) 566. But a judgment against one upon a firm debt may be levied upon the partnership property. Brinkerhoff v. Marvin, 5 Johns. Ch. (N. Y.) 328. It must be borne in mind that in those states where by statute a creditor may proceed against one or all the joint debtors, judgment against one does not discharge the others. Lyons v. Hamilton, 2 Miss. 474; McLain v. Carson, 4 Ark. 164; Griffin v. Samuel, 6 Mo. 50; McCulloch v. Judd, 20 Ala. 703; Scott v. Colmesnil, 7 J. J. Marsh. (Ky.) 418. Where an ostensible partner purchased for the firm a quantity of cotton, and gave his notes for the amount, and after suit brought and judgment obtained against the ostensible partner the vendor first discovered there was a dormant partner, and then commenced a suit against the dormant partner for goods sold, it was held the suit could not be sustained. The judgment against one partner extinguished the original debt. Moale v. Hollins, 11 Gill & J. (Md.) 11. Where one partner gives a note under seal, in the name of the firm, without the authority of the other partners, the original debt is discharged, but the other partners are not liable. After a decision to this effect, the partners in the partnership name purchased goods and gave a note including the amount due on the sealed note. It was held this latter note was good as to the goods purchased, but void as to balance, as the old debt had been discharged by the new note. Waugh v. Carrier, 1 Yerg. (Tenn.) 31. One partner has no authority to execute a sealed contract in the name of the firm. But it is binding on the partner signing, and the simple contract of the partners is merged by the instrument. Morris v. Jones & Spencer, 4 Harr. (Del.) 428. A suit and judgment against one partner, upon an individual acceptance given by him in payment of an account against the firm, merges the original debt of the firm, and precludes a suit against the other members of the firm for the same debt. Nichols & Co. v. Burton, 5 Bush (Ky.), 320. Judgment rendered against one of several partners, on promissory notes, merges the claim so that another suit on the notes against a partner not sued in the original action cannot be sustained, nor can a suit be sustained on the judgment against the partner for whom an attorney appeared without authority. Thompson v. Emmert, 15 Ill. 415.

mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may

bers alone for a debt owing to the plaintiff by the firm. In such a case the defendant should plead the non-joinder of his copartners in abatement. See Stackwood v. Dunn, 3 Q. B. 823. Again, if a firm holds the note of a person to whom it is itself indebted, and in order to deprive him of his right of set-off, indorses the note to one of its members, and he alone sues on it, a plea disclosing the facts and setting off the debt owing to the defendant by the firm will be good. See Puller v. Roe, 1 Peake (N. P.), 260. Courts of equity, although governed in questions of set-off by principles similar to those which govern courts of law, go further than courts of law in applying those principles, admitting set-off in some cases where courts of law do not and disallowing it in others where they do. See, generally, as to set-off in equity, Rawson v. Samuel, Cr. & Ph. 161; Freeman v. Lomas, 9 Ha. 104. This arises partly from the circumstance that at law the right to set off depends entirely on a statutory enactment, which admits it only to a very limited extent, and partly from the freedom of courts of equity from those technical rules of pleading by which the courts of common law have been so greatly fettered.

As regards set-off in cases of partnership, it will be sufficient, after what has been already laid before the reader, to show that in equity mutual debts may be set off, if in substance they are both joint or both several, although they are not so in point of form, and that, on the other hand, debts which are not both joint or both several in substance, although they are so in form, cannot be set off against each other. As illustrating the first of these propositions, reference may be made to Smith v. Parkes, and Cavendish v. Geaves. In Smith v. Parkes, 16 Beav. 115, a firm of three partners covenanted to pay a certain sum of money to the defendant Parkes, who was indebted to the firm in certain other sums on another account. By the death of two of the members of the firm, the plaintiff Smith had become the sole surviving partner, and he was sued by Parkes on the covenant, and judgment was obtained. It was held that, notwithstanding the judgment and its effect at law, Smith was entitled in equity to set off against the judgment debt the amount of what was due from Parkes to the late firm, and it was also held that Smith had this right not only as against Parkes, but also against persons to whom he had assigned the debt due to him.

In Cavendish v. Geaves, 24 Beav. 163, the plaintiff was indebted on bonds to a firm of bankers. Many changes in the constitution of the firm took place, and the bonds in question were on each change assigned by the old to the new firm. The plaintiff had an account with the bank as one of its customers, and when the bank stopped payment, a balance was owing to him on that account, but the bonds had been previously assigned to third parties without notice, however, to the plaintiff. The question then arose, whether, notwithstanding the various changes in the firm and the assignment of the bonds, the plaintiff was entitled to set off against the debt due from him on the bonds, the amount due to him as a customer of the bank, and it was held that he was. The judgment in this case is peculiarly instructive, and the following extract from it is submitted to the reader without apology: "If a customer borrow money from his bankers and give land to secure it, and afterward on the balance of his general banking account a balance is due to the customer from the same bankers who are the obligees of the bond, a right to set off the balance against the money due on the bond will exist both at law and in equity. If the firm were altered and the bond assigned by the original obligees to the new firm and notice of that assignment were given to the debtor, and if after this a balance were due to him from the new firm (the assignees of the bond), then no right of set off would exist at law, because the assignment of the chose in action would be inoperative at law, and the obligees of the bond and the debtor on the general account would be different persons; but as in equity the persons entitled to the bond and the debtors on the general account would be the same persons, a right of set-off would exist in this court, and the customer would in equity be entitled to set off the balance due to him against the bond debt due from him. If after the bond had been given it had been assigned to strangers, and no notice of the assignment had been

be set against the other." This was made perpetual by 8 Geo. 2, c. 24, s. 4; and to remove any doubt as to whether debts of a different nature could be set off, it was further enacted by that act that "mutual

given to the original debtor (the obligor of the bond), then his rights would remain the same. Thus, if the assignment had been made to the stranger before any alteration of the firm, then the right of set-off would still remain at law, where the obligees of the bond and the debtors on the general account would be the same persons, and in equity also if the matter of account were brought here, as the assignees of the chose in action would be bound by the equities affecting their assignors. But if notice of the assignment had been given to the original debtor, no right of set-off would exist in this court for the balance subsequently due by the bankers to the obligor, because the persons entitled to the bond would, as the obligor knew, be different persons from the debtors to him on the general account with whom he had continued to deal.

"If the assignment of the bond had been made to the new firm with notice to the obligor, they would, if debtors on the general account, be liable to the same rights of set-off in equity as if they had been the obligees.

"If, after the alteration of the firm and after the assignment of the bond to the new firm, with notice to the debtor or obligor of that assignment, an assignment had been made of the bond to strangers, and no notice of that second assignment given to the obligor, then the rights of set-off would still remain to him in equity as against the first assignees, of whose assignment he had notice, and the second assignees would in equity be bound by it, because, as I have stated, the assignees of the bond take it subject to all the equities which affect the assignors."

The court, after laying down these general propositions, came to the conclusion on the evidence in the case, that the plaintiff was informed that the successive firms with which he dealt as customers were his creditors in respect of the bonds, but that he had no notice of their assignment by the firm which stopped payment to the holders of them and that, therefore he was entitled, even as against such holders, to set off what was due to him as a customer of the bank when it stopped payment.

The above decisions are sufficient to show that in allowing debts to be set off against each other courts of equity go far beyond courts of law, although they do not introduce any new principle of set-off. The truth of this is still more apparent from the cases in which set-off is not allowed, one of the debts being joint and the other several only. In strict analogy to the rule which obtains at law, it has been decided in equity that if the members of a firm have separate private accounts with the bankers of the firm, and a balance is due to the bankers from the firm on the partnership account, the bankers have no lien for such balance on what may be due from themselves to the members of the firm on their respective separate accounts, and that the debt due to the bankers from the partners jointly cannot be set off against the debts due from the bankers to the partners separately. See Watts v. Christie, 11 Beav. 546; Cavendish v. Geaves, 24 id. 173. But courts of equity do not altogether follow the rules of law in administering the estate of a deceased member of a firm, for although, on the principle that a debt due from a firm is due from all the partners severally as well as jointly, a creditor of the firm is in equity regarded as a creditor of its deceased members, yet, when a creditor of a firm seeks to obtain payment of his debt out of the estate of a deceased partner, that creditor cannot set off a debt due from him to the deceased on a separate account, but must pay this last debt in full, and then, as regards the debt in respect of which he sues, rank as any other creditor of the firm against the assets of the deceased. See Addis v. Knight, 2 Mer. 117. It is obvious that, if in such a case the two debts were set against each other, the separate creditors of the deceased would be paying a joint creditor of the firm, unless the assets of the deceased were sufficient to pay both classes of creditors in full.

Again, in a case which underwent much litigation, it was held by Lord Brougham, both in the Court of Chancery and in the House of Lords, that a debt due to a firm was not satisfied by an arrangement made by one of the partners with the debtor to the firm, to the effect that moneys of the debtor come to the hands of the partner in question, should be set against the debt due to him and his copartner. Nottidge v. Prichard, 2 Cl. & Fin. 379, and 8 Bli.

debts may be set against each other, notwithstanding that such debts are deemed in law to be of a different nature, unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty; and in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same, hath accrued, or shall accrue, by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shown how much is truly and justly due on either side; and in case the plaintiff shall recover in such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to him, after one debt being set against the other as aforesaid."

Torts not subject of set-off.

SEC. 754. It is observable from the words of the statutes that the demand, as well of the plaintiff as of the defendant, must be a debt, and a set-off is not allowed in action for torts, as upon the case, trespass, replevin, or detinue.[1] The only actions on which a set-off is allowed are assumpsit, debt, and covenant for the non-payment of money;[2] and it has been laid down that debts, to be set off, must be such as an *indebitatus assumpsit* will lie for; and that uncertain damages, or un unliquidated demand, cannot be made the subject of a set-off.[3]

Must be debts due in same right.

SEC. 755. As mutual debts only can be set off against each other, the debts sought to be recovered, and those sought to be set off, must

---

(N. S.) 493, affirming Pritchard v. Draper, 1 R. & M. 191, as decided on appeal from the decision of Sir John Leach, reported in the same place, and in Taml. 332

If this case had occurred at law, and the firm had been plaintiff, the set-off would probably have been allowed, on the ground that one of the members of the firm at all events was precluded from suing the defendant. See Wallace v. Kelsall, 7 M. & W.

The last three decisions sufficiently illustrate the application in equity of the general doctrine, that joint debts and separate debts cannot be set off against each other. But in applying this doctrine regard must be had to any agreement which the parties themselves may have come to, and to their course of dealing with each other. For if it can be shown that all parties concerned have expressly or impliedly agreed that a debt owing by one of them only shall be set off against a debt owing to them all, or *vice versâ*, effect will be given to that agreement, and the application of the general doctrine in question will thereby be precluded. See Vulliamy v. Noble, 3 Mer. 593; Downam v. Matthews, Prec. in Ch. 580; Cheetham v. Crook, McLel. & Y. 307; Kinnerly v. Hosack, 2 Taunt. 170.

[1] 1 Chit. Pl. 486: B. N. P. 181.

[2] 1 Chit. Pl. 486; B. N. P. 181.

[3] Per Ashurst and Aston, J. Howland v. Strickland, Cowp. 56. They may be recouped, however, in cases where they arise out of the transaction in suit.

be due in the same right. A joint debt, therefore, cannot be set off against a separate debt, nor a separate debt against a joint one.[1] Thus, in an action on a policy, effected by the plaintiff in his own name, but in which others are interested with him, the defendant cannot set off a debt due to him from the plaintiff only.[2] So, in an action by the solvent partner, and the assignees of a bankrupt partner, to recover moneys paid by the latter after his bankruptcy, the defendant cannot set off a demand which he has against the firm to a larger amount.[3]

Sufficient that the rights are essentially the same.

SEC. 756. But demands which are essentially, though not perhaps specifically or in point of form, joint, may be set off against each other. Thus, if a person give a note to his bankers for a debt due to them, and they afterward indorse it to one of their members as his separate property, in an action by such indorsee, against the maker the latter may set off any debt due to him from his bankers against the demand on the note, for here the demands were originally joint and mutual, and are not altered by the private arrangement of the partners.[4] So, money due for advances made by bankers to a customer, upon a bond given by the customer to one of the partners, in trust for the rest, may be set off against a debt from the firm.[5] And, clearly, although a mere nominal partner contract a debt, yet, if it be contracted in the partnership name, such debt may be set off in an action by the firm.[6]

---

[1] Tidd's Prac. 717; J .S. Saund. Pl., tit. "Set-off;" M'Gillivray v. Simson, 2 Car. & Payne, 320; Jones v. Fleeming, 7 Barn. & Cres. 217.

[2] Grant v. Royal Exchange Ass. Co., 5 Mau. & Sel. 439.

[3] Thomason v. Frere, 10 East, 427; Stanniforth v. Fellowes, 1 Marsh. 184.

[4] Puller v. Roe, 1 Peake, 197.

[5] Crosse v. Smith, 1 Mau. & Sel. 545. In bankruptcy it has been held that, under certain circumstances, distinct banking-houses, having some members in common, may set off the amount of the bankrupt's notes in their hands, against the amount of all their respective notes in the bankrupt's hands. Ex parte Huckey, 1 Madd. 577.

[6] Teed v. Elworthy, 14 East, 213; see Booth v. Hodgson, 6 T. R. 405.

Set off.—A debt due from one partner cannot be set off against a debt due the firm, Williams v. Brimhall, 13 Gray (Mass.), 462; even though so agreed with such partner, Evernghim v. Ensworth, 7 Wend. (N. Y.) 326; Rogers v. Batchelder, 12 Pet. (U. S.) 221; Dob v. Halsey, 16 Johns. (N. Y.) 34; unless the other partners knowing of such agreement have assented thereto, either expressly or by fair inference. Homer v. Wood, 11 Cush. (Mass.) 62. This was expressly held in Williams v. Brimhall, *ante*, in which it appeared that the defendant employed the firm of Bigelow & Smith to erect a house for him. The contract was made with Bigelow alone, and it was agreed between him and the defendant that the house should be built in payment of a private debt due from Bigelow to the defendant. The court held that if the defendant knew of the partnership between Bigelow & Smith, and both performed the labor, the amount to be paid therefor might be recovered of the defendant, notwithstanding the agreement between him

Demands essentially separate.

SEC. 757. A similar observation may be applied to demands which are essentially separate. Thus, if a firm be carried on in the name of only one person, in an action by the firm the defendant may set off a separate debt from that person against the debt for which he is sued.[1] So, if a factor, who sells goods for a firm under a *del credere* commission, sells them as his own, and the buyer knows nothing of the owners, he may set off a debt due to him from the factor, against the demand of the owners of the goods.[2] So, likewise, an obligee on a joint bond executed by one obligor only may set off the bond debt in an action brought against him by the executing obligor.[3]

Effect of agreement to sever.

SEC. 758. And although joint demands cannot ordinarily be set off against separate demands, or *vice versa*, yet, where there is an express agreement between a person dealing with a firm, that the debts severally due from the members of the firm to that person shall be set off against any demands which the firm may jointly have on him, it has been held that such agreement will be binding.[4] Where the action is brought by a surviving partner, the defendant may set off a debt due from the plaintiff as surviving partner, against a debt due from himself to the plaintiff in his own right.[5] And, conversely, a debt due to a defendant as surviving partner, may be set off against a demand on him in his own right.[6] A judgment debt due from A, and others, in an action of trespass, may be set off against a judgment debt due to A from the plaintiff.[7]

---

and Bigelow that it should be applied in payment of his private note, as such contract was a fraud upon and void as against the firm, and that the note could not be set off against such claim. "In the present case," said Bigelow, J., "the defendant knew of the copartnership and of the nature of the business carried on by the firm, and that the work that was to be done for him was within the scope of that business. *Prima facie*, it was work to be done by the copartnership, and the agreement to set off his private debt for the work to be performed by the firm was *prima facie* a contract for the misappropriation of that which he knew belonged to the firm. As this was done without the knowledge or assent of the other partner, it was evidence of a fraud on the firm, and as the defendant offered no evidence to rebut this *prima facie* case * * he failed to establish his set-off." See, also, to the same effect, Cadwallader v. Kroesen, 22 Md. 200, where it was held that a person, who sold property to one partner to be paid for in groceries of the firm, could not set-off such claim against an action by the firm to recover the price of the groceries. This is consistent and in conformity with the principle that one partner cannot apply the partnership funds or securities to the payment of his private debts without the assent of his copartners. Caldwell v. Scott, 54 N. H. 414; Rogers v. Batchelor, 12 Pet. (U. S.) 221; and it makes no difference whether the creditor knew of the partnership or not. Caldwell v. Scott, *ante*.

[1] Stacey v. Decey, 1 Esp. 469; 7 T. R. 361.

[2] George v. Claggett, 7 T. R 359.

[3] Fletcher v. Dyche, 2 T. R. 32; and see Elliott v. Davis, 2 Bos & Pull. 338.

[4] Kinnersley v. Hossack, 2 Taunt. 128.

[5] French v. Andrade, 6 T. R. 582.

[6] Slipper v. Slidstone, 5 T. R. 493.

[7] Bourne v. Bennet, 4 Bing. 423; 1 Moore & Payne, 141.

Court will sometimes order set-off of judgments.

SEC. 759. The courts of common law will, upon motion, in some cases order opposite demands arising upon judgments to be set off against each other, although the parties to the different records are not the same.[1] Thus, in Mitchell v. Oldfield,[2] the plaintiff recovered a judgment against the defendant, but the defendant, having also recovered in another action against the plaintiff and another, obtained a rule to show cause why the debt and costs in the latter should not be set off against the judgment in the former action; and although it was objected that these joint and separate debts could not be set off under the statute, the court nevertheless made the rule absolute on the defendant undertaking that the bill of the plaintiff's attorney[3] should be satisfied, and on his entering a remittitur in the cause in which he was plaintiff. Lord Kenyon said that this did not depend on the statutes of set-off, but on the general jurisdiction of the court over the suitors in it; that it was an equitable part of their jurisdiction, and had been frequently exercised. So, in another case, where an action was brought against three defendants, one of whom had recovered a judgment in a former action against the plaintiff, it was held that the judgment in the former action might be set off against the judgment in the latter.[4] It is to be observed that in the former of these two cases it appeared that the plaintiff against whom the set-off was allowed had absconded, and in the latter an affidavit was made by the defendant that the plaintiff appeared to be insolvent; that his goods were all distrained for rent, and that he was not to be met with. But where a judgment had been recovered by A against B and C, and afterward a judgment was recovered against A, by the assignees of B, under an insolvent debtors' act, the court refused upon the application of A to set off the former judgment against the latter, on the ground that in this case the interests of third persons intervened. And Lord Ellenborough expressed a strong disinclination to extend the power of setting off debts on general grounds of equity beyond the line which the legislature had thought proper to mark out.[5]

Infancy, plea of.

SEC. 760. If one of the partners is an infant, we have seen that he may plead his infancy. To an action brought against two persons

[1] Mont. Partn. 87.
[2] 4 T. R. 123.
[3] See Reg. Gen. 93, Hil. T. 1832.
[4] Dennie v. Elliot, 2 H. Bl. 587.
[5] Doe v. Darnton, 3 East, 149; and see Hewitt v. Pigott, 8 Bing. 61.

on their joint and several covenant, one of the covenantors cannot plead the infancy of the other.[1]

Bankruptcy.

SEC. 761. If one of the partners is a bankrupt, he cannot give this in evidence under the general issue;[2] but if the act of bankruptcy took place before the suit commenced, he may plead his bankruptcy generally, under the 126th section of the statute. The plaintiff may then enter a *nolle prosequi* as to him, and proceed against the others.[3] If, however, the bankruptcy took place after the suit commenced, he must plead his bankruptcy and certificate specially.[4] And if the certificate were not obtained until after plea pleaded, he must plead his bankruptcy and certificate specially *puis darrein continuance.*[5] In such cases the plaintiff may enter a *nolle prosequi* as to the bankrupt, and proceed against the rest; but he cannot, at *Nisi Prius*, upon a plea of bankruptcy *puis darrein continuance*, by one of two defendants, confess the plea to be true, and go on with the case as to the other defendant.[6]

In case of joint tort.

SEC. 762. We have seen that if a joint tort be committed, the plaintiff may, at his election, sue all or any of the tort feasors.[7] But if divers commit a trespass, though this be joint or several at the election of him to whom the wrong is done, yet, if he releases to one of them, all shall be discharged, because his own deed shall be taken most strongly against himself.[7] Hence, if trespass be brought against three, and judgment given against one, and the plaintiff enter a *nolle prosequi* against the other two, if the *nolle prosequi* be before judgment, it will discharge the whole action. So, if judgment had been against all three, and the plaintiff had entered a *nolle prosequi* against the two, for nonsuit, or release, or other discharge of one, discharges the rest.[8] So, where in trover against two one pleaded not guilty, and a verdict was found against him, and the other pleaded a release, and a verdict was found for him, on a motion for a judgment against him who was found guilty, it was denied, because the trover being joint, a release of all actions discharged both.[9]

---

[1] Gillow v. Lillie, 1 Bing. N. C. 695.
[2] Gowland v. Warren, 1 Camp. 363.
[3] Noke v. Ingham, 1 Wils. 89. But bankruptcy is no bar to an action of trover. Parker v. Norton, 6 T. R. 695.
[4] Arch. Pl. 271.
[5] Todd v. Maxfield, 6 Barn. & Cres. 105; Steph. Pl. 89. But see Humphreys v. Knight, 4 Moore & Payne, 375; 6 Bing. 572.
[6] Pascall v. Horsely, 3 Car. & Payne, 372.
[7] Co. Litt. 282; Bac. Abr. Release, g.
[8] Parker v. Lawrence, Hob. 70.
[9] Kiffin v. Willis, 4 Mod. 379.

When defense is joint.

SEC. 763. In general, when the defense is in its nature joint, several defendants may join in the same plea, or they may sever; and one defendant may plead in abatement, another in bar, and the other may demur;[1] and in tort one may plead not guilty, and the other a justification.[2] If the defendants plead severally, the plaintiff may demur to one plea, and join issue on the other.[3]

---

[1] 1 Chit. Pl. 480; Com. Dig., Pleader, (2 A. 3).

[2] 1 Chit. Pl. 482; Com. Dig., Pleader (2 A. 3).

[3] Com. Dig. Pleader (E. 35).

CHAPTER XXXI.

OF THE EVIDENCE.

SEC. 764. Evidence must be sufficient to hold all.
SEC. 765. Strict proof required.
SEC. 766. May be by parol.
SEC. 767. That bills were drawn or accepted in particular way.
SEC. 768. Acts and conduct of the parties.
SEC. 769. Answer to bill in equity, when admissible.
SEC. 770. Records in former suits.
SEC. 771. Declarations or admissions, how far admissible.
SEC. 772. Statements made by others in presence of defendants.
SEC. 773. Admission of one partner.
SEC. 774. Evidence required to sustain plea of non-joinder.
SEC. 775. When admissions of one partner are admissible.
SEC. 776. Admissions after dissolution.
SEC. 777. Admissions by agent after retirement of one partner.
SEC. 778. What must be shown to hold the firm.
SEC. 779. Admission does not make person a partner, may show that he was not.
SEC. 780. When estopped from denying.
SEC. 781. May show admissions had no reference to partnership.
SEC. 782. Rule in Ridgway v. Phillips.
SEC. 783. When one partner may be called to prove partnership.
SEC. 784. Interest of witness.
SEC. 785. No party examined without consent.
SEC. 786. Evidence in actions for tort.

Evidence must be sufficient to hold all the defendants.

SEC. 764. It is essential, in an action *ex contractu* against partners, that there should be sufficient evidence to affect all the defendants, for, if the plaintiff fail to fix any one of them, he will be nonsuited.[1] We have already investigated the circumstances which constitute the legal evidence of the existence of a partnership; we have likewise examined the various liabilities which attend the connection between

[1] Young v. Hunter, 4 Taunt: 582; Noke v. Ingham, 1 Wils. 89; Cooper v. Whitehouse, 6 C. & P. 595.

partners; it now remains to consider in what manner and by what witnesses evidence of the partnership may be established.

Strict proof required.

SEC. 765. In order to charge persons as partners, the utmost strictness of proof of the partnership is not required. It is sufficient to show that they have acted as partners, and that by their habit and course of dealing, conduct and declarations, they have induced those with whom they have dealt to consider them as partners.[1] Hence, if,

[1] See 3 Stark. Ev. 1070.

How liability as partner may be established. — "The question," says Mr. Lindley, vol. 1, p. 84, "whether a partnership does or does not exist between any particular persons, is a mixed question of law and fact, and not a mere question of fact. It is, nevertheless, a question to be decided by a jury, who, taking their own view of the effect of the evidence before them, are bound to apply to the facts established to their satisfaction those legal principles which the court may lay down for their guidance. See Fox v. Clifton, 9 Bing. 117. If the question of partnership or no partnership is raised before a judge in chancery, he will direct an issue, if in his opinion there is room for reasonable doubt, Travis v. Milne, 9 Ha. 157; M'Gregor v. Bainbridge, 7 id. 164, n.; Ex parte Matthews, 3 V. & B. 125; Ex parte Langdale, 18 Ves. 300; Peacock v. Peacock, 16 id. 53, and 2 Camp. 45; Binford v. Dommett, 4 Ves. 756; Whately v. Menheim, 2 id. 608; but if the evidence is such as to satisfy him beyond doubt, he will decide the question himself and not put the parties to the expense of a trial at law. Robinson v. Anderson, 7 De G. Mc. & G. 239; Dale v. Hamilton, 2 Ph. 266; Foster v. Hale, 5 Ves. 308; Metcalf v. Royal Ex. Co., Barn. 343, and 2 Mont. Part. 24. As to summoning a jury instead of directing an issue, see Bradley v. Bevington, 4 Drew. 511, where V. C. Kindersley declined to order a question of partnership or no partnership to be tried by himself and a jury before the hearing of the cause. In considering the evidence which it is necessary to adduce in order to establish the existence of a partnership, two perfectly distinct questions immediately suggest themselves, viz.:

1. What is to be proved? 2. How is it to be proved?

1. With reference to the first question, the distinction between partnerships and *quasi*-partnerships is all important; for it by no means follows, that persons who are not partners are not liable as if they were; nor does it follow that persons who are liable as if they were partners are partners in reality. This has been already explained; and, in fact, the answer to the first of the above two questions will be found in that portion of the present work in which the nature of the contract of partnership was discussed, and it will therefore only be necessary to recapitulate as shortly as possible the propositions there established.

The existence of a partnership may be established by showing: —

1. A distinct agreement for a partnership in so many words; or, 2, an agreement to share profit and loss; or, 3. An agreement to share profits; or, 4, such a state of things as is sufficient to establish a *quasi*-partnership. That this is *prima facie* evidence of a real partnership, see Peacock v. Peacock, 2 Camp. 45. The first two of these will be conclusive; the third will be strong, and the fourth *prima facie* evidence of the evidence of a partnership.

The distinction, however, between existing and contemplated partnerships must not be overlooked, and it may be useful to remind the reader that evidence which would fail to establish a *quasi*-partnership must, *a fortiori*, fail to establish a real partnership between the same persons. For the purpose of proving the existence of a *quasi*-partnership between several persons, it is sufficient to show either. That they share profits — attending to the distinctions already pointed out between profits, payments varying with them, and gross returns — or, that there has been a holding out to the plaintiff. The distinction between existing and contemplated partnerships is of as much importance here as before; and it is obvious that if, in attempting to establish a *quasi*-partnership, a real partnership

it appear that two persons have in many instances traded jointly, that will be *prima facie* evidence of a general partnership, particularly if the instances of joint dealing greatly outweigh the instances

should be shown to exist, the liability of the persons sought to be charged will only be established the more completely. What has to be proved in order to show that a person is a member of a company, and to establish his liability to be placed on the list of contributories, or to be sued for calls, or to have execution for a debt of the company issued against him, or, on the other hand, to establish his rights as a shareholder, will be pointed out hereafter.

2. With reference to the means of proof, it is the province of a writer on evidence to discuss the method by which facts to be established may be proved, and it is not consistent with the plan of this work to examine the principles relative to the production or admissibility of evidence. At the same time, a few observations on some points of practical importance with respect to the mode of proving the existence of a partnership are laid before the reader, in the hope that they may be found of use. As partnerships very often exist in this country without any written agreement at all, the absence of direct documentary evidence of any agreement for a partnership is entitled to very little weight. As between the alleged partners themselves the evidence relied on, where no written agreement is forthcoming, is their conduct, the mode in which they have dealt with each other, and the mode in which each has, with the knowledge of the others, dealt with other people. This can be shown by books of account, by the testimony of clerks, agents, and other persons, by letters and admissions, and, in short, by any of the modes by which facts can be established. As to the presumption arising from the joint retainer of solicitors, see Robinson v. Anderson, 20 Beav. 98, and 7 De G. Mc. & G. 239; Webster v. Bray, 7 Ha. 159; M'Gregor v. Bainbridge, id. 164. And for cases in which a partnership has been inferred from a number of circumstances, see Nerot v. Bernand, 4 Russ. 247, and 2 Bli. (N. S.) 215; Jacobsen v. Hennekinius, 5 Bro. P. C. 482; Nicholls v. Dowding, 1 Stark. 81; Peacock v. Peacock, 2 Camp. 45; Worts v. Pern, 3 Bro. P. C. 548, where there was a draft agreement which had been acted on. See, as to obtaining evidence from the solicitors of the alleged partners, Williams v. Mudie, 1 Car. & P. 158. An agreement for a partnership may be continued in one document or many, as, for example, in a series of letters. Moreover, a prospectus or advertisement issued by one person and assented to by another, is abundant evidence of a contract upon the terms contained in the prospectus or advertisement, Fox v. Clifton, 6 Bing. 797, 798; and the contract thus established cannot be departed from by either party without the consent of the other, Blackburn's case, 3 Drew. 409; and any subsequent contract based upon the prospectus or advertisement will be construed as carrying out the terms therein contained, unless it can be shown that those terms were intended by both parties to be varied. Fenn's case, 4 De G. Mc. & G. 285; Mowatt v. Londesborough, 3 E. & B. 307, and 4 id. 1; but see Watts v. Salter, 10 C. B. 477. When it is sought to make a person liable as if he were a partner, evidence must be adduced of his acts, or of what has been done by other people with his knowledge and with his consent. The statements and acts of his alleged copartners are no evidence against him until he and they are shown to have been connected in some way with each other, and it is obviously reasoning in a circle to infer a partnership from any acts of theirs, unless those acts can be imputed to him for some other reason than that he and they are partners. See 1 Tay. Ev., § 533; Grant v. Jackson, Peake, 268. Upon this principle it has been held that the registers of ships are no evidence of ownership except as against the persons upon whose affidavit the entries in the registers were made, Tinkler v. Walpole, 14 East, 226; Flower v. Young, 3 Camp. 240; and see M'Iver v. Humble, 16 East, 174; that entries in the office in Somerset House for licensing stage-coaches are no evidence to prove that the persons named in the license are the owners of the coach, Strother v. Willan, 4 Camp. 24; Weaver v. Prentice, 1 Esp. 369; and that the acts, letters and statements of one promoter of a company are no evidence against another, who cannot be shown to have authorized them. See Drouet v. Taylor, 16 C. B. 671; Burnside v. Dayrell, 3 Ex. 224; Watson v. Charlemont, 12 Q. B. 856. This will be again alluded to in a subsequent chapter. It

of separate dealing. In a case where A and B had dealt as partners in two transactions only, it was urged that this would raise such a strong presumption of a general partnership, as to dispense with

---

need scarcely be observed that the principle now under discussion does not apply to exclude the testimony of a person deposing to the existence of a partnership between himself and another. Such testimony was not excluded even before the alteration of the law relating to the competency of witnesses, Hall v. Curzon, 9 B. & C. 646; Blackett v. Weir, 5 id. 385; and there is no pretense for excluding such testimony now. If a partnership is alleged to exist between A and B, and A is called to prove it, and he denies it, then, although the person calling A as a witness cannot adduce further evidence to show that his testimony is generally unworthy of credit, yet such person may adduce other evidence to show that the partnership denied by the witness does in point of fact exist. Ewer v. Ambrose, 3 B. & Cr. 746. Further it is to be observed that, notwithstanding the principle above stated, after sufficient evidence has been given to raise a presumption that several persons are partners, then the acts of each of those persons are admissible as evidence against the others for the purpose of strengthening the *prima facie* case already established. Thus in Norton v. Seymour, 3 C B. 792, in order to prove a partnership between the defendants Seymour & Ayres, the plaintiff called a witness who deposed that Ayres had in conversation admitted the partnership, and then the plaintiff gave in evidence a circular and invoice issued by Seymour, and headed Seymour & Ayres, and stated that the business would in future be carried on in those names. Ayres objected to the admissibility of this document, there being, as she contended, no evidence to connect her with it, but the court held it to be admissible, for, before the document was put in, evidence of a partnership had been given, and the document tended to confirm that evidence. So in Nicholls v. Dowding, 1 Stark. 81, *prima facie* evidence of a partnership having been given, the declarations of one of the defendants were inquired into for the purpose of binding the others, and it was held that such evidence was admissible, a foundation for it having been previously laid. See, too, Alderson v. Clay, 1 Stark. 405. A person may be made liable as if he were a partner without the proof of any partnership articles or deed which he may have executed. Alderson v. Clay, 1 Stark. 405, where a person was proved to be a member of a company without the production of the company's deed. And although in order to prove an actual partnership it may be necessary by the law of some other country to show that some formality has been observed, the non-observance of that formality will not prevent persons who in fact trade as partners, from being so treated in questions arising between them and third partners. Shaw v. Harvey, Moo. & Mal. 526; Maudslay v. De Blanc, 2 C. & P. 409, note. An admission made by any one that he is a member of a particular partnership or company is of course evidence of that fact against him, Sangster v. Mazareddo, 1 Stark. 161; Studdy v. Saunders, 2 D. & Ry. 347; Clay v. Langslow, 1 Moo. & Mal. 45; and such an admission renders it unnecessary for the purpose of fixing him with the liabilities of a partner, to show that he executed any document whereby he became a partner. Harvey v. Kay, 9 B. & C. 356; Ralph v. Harvey, 1 Q. B. 845, and see Tredwen v. Bourne, 6 M. & W. 461. Thus it has several times been held that a person, who had admitted himself to be a shareholder in a company constituted by deed, may be rendered liable as a shareholder without any evidence being given as to that deed. Admissions, however, are not necessarily conclusive, and little weight ought to be attached to them if it is shown that they were made under erroneous suppositions. This seems to have been the true ground of the decision in the much debated case of Vice v. Anson, 7 B. & C. 409. See, on this case, Owen v. Van Uster, 10 C. B. 818, and *query*, if it is law; for though the defendant had no legal interest in the mine, was she not entitled as a partner to share the profits obtained by working the mine? and what more was necessary to make her liable to the supplier? There the defendant supposed herself to be a shareholder in a mine; she had in private letters and in private society written and spoken of herself as a shareholder; she had received certificates stating that her name was registered in the act-book of the mine, and that she was entitled to share the profits of it; and, lastly, she had paid deposits on her shares.

proof that the particular debt sought to be recovered was contracted on the joint account. Lord Ellenborough appears to have held otherwise, but he said that had the instances of joint-dealing preponderated,

But Lord Tenterden held that she had not in point of fact any interest in the mine, and that as she never represented to the plaintiff that she was a shareholder therein, she could not be made liable to him simply because of her erroneous suppositions and admissions. The inconclusive nature of an admission was distinctly recognized in Ridgway v. Philip, 1 Cr. M. & R. 415, where Parke, B., said, "It frequently happens in cases where the liability of persons as partners comes in question that the juries are induced to give too much effect to slight evidence of admissions. An admission does not estop the party who makes it; he is still at liberty, as far as regards his own interest, to contradict it by evidence." In that case one of the defendants was allowed to explain an admission made by him to the effect that he was in partnership with the others. See, too, Newton *v.* Belcher, 12 Q. B. 921, 925, as to the admissions made by promoters of companies as to their liabilities. So, where the freighters of a ship addressed a letter to the captain, instructing him on his arrival at the Cape to call upon their managing partner, Mr. W. G. Anderson, it was held competent to the freighters to show that Mr. Anderson was not a partner of theirs. Brockbank v. Anderson, 7 Man. & Gr. 295. The real question was, whether Anderson was an interested witness, which he would have been had he been a partner. See Mant v. Mainwaring, 8 Taunt. 139; Brown v. Brown, 4 Taunt. 752.

An admission by one person, that he and another are partners, may be open to the explanation that they are partners to some limited extent or with respect to some particular transaction, but not to the extent or with respect to the business necessary to sustain the case made against him. Persons may be partners in some particular concern or business and yet not be in partnership generally so as to render them liable as partners in cases not connected with that particular business, and a person who has admitted that he and others are partners is allowed to show that he and they are not partners to the extent or for the purposes relied upon by those seeking to avail themselves of his admission. See Ridgway v. Philip, 1 Cr. M. & R. 415, and De Berkom v. Smith, 1 Esp. 29.

Again, persons may agree that as between themselves the partnership between them shall be deemed to have commenced at some time before its actual commencement. Proof of such an agreement as this would not enable a stranger to make the parties to it liable to him as partners for what took place before the partnership in point of fact began. As to third parties, such an agreement is *res inter alios acta*, which does not affect them in any way, Wilsford v. Wood, 1 Esp. 182; Vere v. Ashby, 10 B. & C. 288, and it is obvious that an admission of the existence of a partnership might be explained in the manner here suggested, and that in such a case the admission might be worth nothing.

The following is the kind of evidence usually had recourse to for the purpose of proving the existence of an alleged partnership or *quasi*-partnership:

Agreements in writing and deeds, showing the right to share profits. Hickman v. Cox, 18 C. B. 617; Barry v. Nesham, 3 id. 641; Battley v. Lewis, 1 Man. & Gr. 155; Bloxham v. Pell, 2 Wm. Blacks. 999; Waugh v. Carver, 2 H. Blacks. 135. If the signature to a deed is proved, its due execution is inferred. Grellier v. Neale, 1 Peake, 198. To prove who constituted a firm of A & Co., the attorney of B & Co. cannot be compelled to produce an agreement made between A & Co. and B & Co., if he objects on the ground of professional confidence. Harris v. Hill, Dowl. & Ry. N. P. Ca. 17.

Admissions.—Sangster v. Mazareddo, 1 Stark. 161; Harvey v. Kay, 9 B. & C. 356; Ralph v. Harvey, 1 Q. B. 845; Clay v. Langslow, 1 Moo. & M. 45.

Advertisements, Prospectuses, etc., containing the names of the alleged partners. Lake v. Argyll, 6 Q. B. 477; Bourne v. Freeth, 9 B. & C. 632; Maudsley v. De Blanc, 2 C. & P. 409, note; Reynell v. Lewis, 15 M. & W. 517; Wood v. Argyll, 6 Man. & Gr. 928. In Ex parte Matthews, 3 & B. 125, an advertisement of dissolution was read on, and names over doors, Williams v.

he thought the *onus* would have been upon the defendants to have shown that there was not a general partnership.[1]

May be proved by parol evidence.

SEC. 766. Where a plaintiff is provided with ample evidence of the acts or dealings of the defendants as partners, it will be unnecessary for him to prove the execution of a deed of partnership by the defendants. Therefore, where an action for goods sold and delivered was brought against a person as being a member of the company to whom they were supplied, it was held sufficient for the plaintiff, although the company was established by deed, to prove by oral testimony, that a company existed under a certain denomination, and that the

---

Keats, 2 Stark. 290, and on carts. Stables v. Eley, 1 C. & P. 614.

Answer in Chancery containing admissions. Studdy v. Saunders, 2 D. & Ry. 347; Grant v. Jackson, 1 Peake, 268.

Bills to customers, Circulars, Invoices, containing the names of the alleged partners. Young v. Axtell, 2 H. Blacks. 242; Norton v. Seymour, 3 C. B. 792.

Bills of Exchange.—The mode in which these have been drawn, accepted, or indorsed, has frequently been relied on with success. Spencer v. Billing, 3 Camp. 310; Guidon v. Robson, 2 id. 302; Duncan v. Hill, 2 Brod. & Bing. 682; Gurney v. Evans, 3 H. & N. 122.

Letters and Memoranda, showing an intention to give a person a share of profits, coupled with evidence that such intention was acted on. Heyhoe v. Burge, 9 C. B. 431.

Meetings.—Attending and taking part in them, Lake v. Argyll, 6 Q. B. 477; Wood v. Argyll, 6 Man. & Gr. 928; Peel v. Thomas, 15 C. B. 714, and requiring them to be called. Tredwen v. Bourne, 6 M. & W. 461.

Registers.—An entry in customs house books made by one of three alleged partners, to the effect that he and the other two were jointly interested in certain goods, though conclusive as between them and the crown, is not so as between them and other persons. Ellis v. Watson, 2 Stark. 458.

Release executed by all the alleged partners. Gibbons v. Wilcox, 2 Stark. 43.

Shares.—The acceptance of shares in a projected company is by no means conclusive even when followed by the payment of deposits. See Vice v. Anson, 7 B. & C. 632; Bourne v. Freeth, 9 id.; Fox v. Clifton, 6 Bing. 776; Pitchford v. Davis, 5 M. & W. 2.

It becomes important, however, when coupled with other facts, showing an interference by the shareholder with the management of the concern. Tredwen v. Bourne, 6 M. & W. 467; Peel v. Thomas, 15 C. B. 714.

Verdict.—A verdict of a jury finding the existence of a partnership upon the trial of an issue directed out of chancery was held by Lord Kenyon conclusive evidence against the partners in a subsequent action brought against them by a creditor. Whatty v. Menheim, 2 Esp. 608.

Use of property by several jointly.—Weaver v. Prentice, 1 Exp. 309.

Witnesses.—A witness may be asked not only who composes such and such a firm, but also whether certain individuals do. Acerro v. Petroni, 1 Stark. 100. In the last case it was held that the counsel may suggest to the witness, called to prove the partnership, the names of the component members of the firm. To prove a partnership between A, in England, and B, in Spain, it was held not enough to show that A once dwelt in a town in Spain, and that B resides and carries on business there in the name of A, B & Co., and that there is no one there by the name of A. Burque v. De Tastet, 3 Stark. 53.

[1] Newnham v. Tetherington, Ross' V. & P. 134, ed. Harrison.

defendant had attended several meetings of the society, and had acted as chairman.[1] And even if a deed be produced to prove that the defendants are in partnership, third persons may object to its being read, if the reading be prejudicial to their interests. Thus, in an action of *assumpsit* against the acceptors of a bill of exchange, in order to prove the liability of some of the defendants as partners, in a firm called the "Fox Hill Stone Pipe Company," the plaintiff's counsel called a witness to produce a deed of composition, executed between the defendants and the "Middlesex Water Works Company," for the purpose of showing that the defendants were all executing parties to the deed, as members of the firm on whose behalf the bill of exchange was accepted. The witness, who was attorney to the Middlesex Water Works Company, produced the deed, but objected on behalf of his clients, that it ought not to be read, inasmuch as it contained matters which might be prejudicial to their interests; that there had been disputes between the two companies, and the deed, if read, might be prejudicial to the Middlesex Water Works Company in their proceedings against the other parties in chancery. And the court allowed the objection. "I cannot," said Lord Tenterden, "order the witness to produce the deed, if he informs me that the disclosure of its contents may prejudice his clients, and I can draw no distinction between this and the ordinary case, where a third party is called upon to produce the title deeds of his estate, and who may object to the disclosure of his title."[2] Where *assumpsit* was brought against partners on a written agreement to underlet premises, which agreement was signed in their name and style of H, C & Co., parol proof that the defendants were in partnership under the firm of H, C & Co., and that they had been frequently seen on the premises, was held to be sufficient, without showing in whose handwriting the agreement was signed, the attesting witness being absent.[3]

That bills were drawn and accepted in a particular way.

SEC. 767. A partnership between A and B may be proved by parol evidence, that bills drawn upon A were accepted by B under certain circumstances, provided there has been one invariable course of dealing between the parties to these bills, according to which they were drawn and accepted. To use the words of Lord Ellenborough — "Parol evidence may be received of one invariable mode of dealing

[1] Alderson v. Clay, 1 Stark. 405.
[2] Harris v. Hill, Dowl. & Ryl. N. P. C. 17; 3 Stark. 140.
[3] Evans v. Curtis, 2 Car. & P. 296.

between parties by means of bills of exchange. If the mode of dealing varies, the bills must be produced, otherwise we should be receiving parol evidence of an individual written instrument, which is not admitted. But where bills are sworn to be always drawn and accepted in the same firm, I think the course of dealing so established may be proved by the parol examination of a witness, for the purpose of showing in what relation the parties stood to each other."[1]

Acts and conduct of the parties.

SEC. 768. In proving a partnership from the acts of the parties in the conduct of their business, a witness may be asked, whether one defendant has interfered in the business of the other, and the question cannot be objected to as a leading question.[2]

Answer to suit in equity not admissible, except.

SEC. 769. The plaintiff, in order to prove the partnership of the defendants, cannot produce the *answer* to a bill in chancery filed by one partner against the other, if the latter object to the production. For there would be the same objection to the admission of this evidence at law, as to the admission of the answer of one defendant against that of another defendant in equity.[3] Thus, in an action against certain partners as the acceptors of a bill of exchange, it was held that the plaintiff could not produce in evidence the answer of one partner to a bill in equity filed by the other, in order to prove the continuance of the partnership until the time of the acceptance, the partner who filed the bill insisting that the partnership had been dissolved before that time.[4] On the other hand, in an action against partners, where there is no dispute between them as to the existence of the partnership, the office copy of an answer to a bill, filed by one against the others for an account, is admissible evidence to establish the partnership, without producing the original. And in the case where this was decided, it was likewise held that, in order to prove the identity of the defendants, the clerk of their solicitor was a competent witness to that fact, though he knew nothing of the defendants, but from his intercourse with them professionally in the conduct of the suit in chancery.[5]

Records in former suits.

SEC. 770. The *record of an issue* to try the fact of partnership has

[1] Spencer v. Billing, 3 Camp. 310.
[2] Nichols v. Dowding, 1 Stark. 406.
[3] See Wych v. Meal, 3 P. W. 310.
[4] Rooth v. Quin, 7 Price, 193.
[5] Studdy v. Sanders, 2 Dowl. & Ryl. 347; see Hennell v. Lyon, 1 Barn. & Ald. 182.

been admitted as evidence of that fact, in an action against certain persons as partners. An action was brought against L and M as partners for goods sold and delivered. L suffered judgment to go by default, but M, who denied the partnership, pleaded *non assumpsit*. It appeared that L had formerly filed a bill in the exchequer against M for an account, and charging him as his partner, and upon that cause being heard, an issue was directed to try "whether L and M were partners at any or what time." The issue was tried, and a verdict found, "that a partnership had subsisted between L and M from the 29th September, 1791, to the 22d January, 1793." And now, in this action, the plaintiff offered in evidence the record of that verdict, in order to prove that L and M were partners when the goods were delivered, namely, in November, 1792, and Lord Kenyon held that it was admissible and conclusive evidence of a subsisting partnership at the time of the goods being sold.[1] But an able writer has questioned the propriety of this decision. After having laid it down as a general rule that a verdict shall not be used as evidence against a man, where an opposite verdict would not have been evidence for him, or, in other words, that the benefit to be derived from the verdict must be *mutual*, he observes, as to the verdict in this case, *first*, that there was no mutuality, and, *secondly*, that it might have been obtained on the evidence of the party who afterward took advantage of it. He, therefore, questions how far the record would be evidence of the fact, as against the defendant who *denied* the partnership, though, as against the other, the whole proceedings in the exchequer suit would operate by way of *admission*.[2]

Declarations or admissions evidence against partner making them.

SEC. 771. A *declaration* or *admission* by a person that he is a partner is evidence against him, and will, as far as he is concerned, be evidence of the existence of the partnership.[3] Therefore, words

[1] Whately v. Menheim, 2 Esp. 608. In Vermont, a bill in equity setting up a partnership. Carlton v. Ludlow, 28 Vt. 507. In Ohio, a mortgage deed executed in the name of the firm, Crowell v. Western Reserve Bank, 3 Ohio St. 414. In Maine the record of a judgment by default against persons as partners has been held sufficient to prove that they held themselves out as partners. Ellis v. Jameson, 17 Me. 237; Cragen v. Carleton, 21 id. 493; Lynch v. Swanton, 53 id. 102; so, also, in New York, Downing v. Mann, 3 E. D. S. (N. Y. C. P.) 36, and in Ohio, Marks v. Sigler, 3 Ohio St. 360. But a contrary doctrine was held in an early case in Maine, where the fact of partnership was put in issue and passed upon by a jury. Burgess v. Lane, 3 Me. 165.

[2] Stark. Ev., vol. 1, p. 195; vol. 3, p. 1074.

[3] De Berkom v. Smith, 1 Esp. 29; Gibbons v. Wilcox, 2 Stark. 43; Parker v. Barker, 3 Moore, 226; Shott v. Streatfield, 2 Mood. & Malk. 9; Whitford v. Tutin, 6 C. & P. 238.

uttered, or letters written, in the course of commercial transactions, are constantly received in evidence, to charge the speaker or writer as a partner,[1] or as having delegated powers to his copartner in relation to the partnership concern.[2]

Statements made by others in presence of defendants.

SEC. 772. Where a person is charged as having held himself out as a partner, a witness may be called to show that he, the witness, reported the defendant a partner, in consequence of a statement or admission made to the witness in the defendant's presence.[3] And, upon the same principle, an entry made according to the statute, at the excise office, by one partner in the names of himself and copartners, as dealers in beer, is *prima facie* evidence of a partnership against the party making it.[4] In an action against several partners, if all are outlawed but one, the plaintiff will be entitled to a verdict against that one, upon his admission that he was in partnership with the others, such admission being evidence against him of the promise of all the defendants.[5] Of course, if an admission of partnership can be proved against all the defendants, all are liable upon that admission alone. Where, in *assumpsit* against several partners, the question of partnership being doubtful upon the plaintiff's evidence, the defendants went into their case, and in order to render a witness competent, produced a release executed by all of them, it was held that this document, though exhibited on the *voir dire*, was in evidence for all purposes, and was alone sufficient to establish the fact of partnership.[6]

Admissions of one partner.

SEC. 773. But the act, admission, or declaration of one partner is not evidence to prove the partnership against the other defendants.[7] Where the question was, whether A, who resided in England, was a partner with B, who resided in Spain, it was held to be no evidence of the fact to show that B had long traded at S, in Spain, under the firm of A & B, and that A for a long time resided there, and there was no other person of that name.[8] In like manner, an affidavit for

[1] Id. Even if the communications be made to the attorney of the defendants they will be evidence against the latter, if made previous to the action, and not for the purpose of defending it. Williams v. Mudie, 1 Car. & Payne, 158.

[2] Thicknesse v. Bromilow, 2 C. & J. 525.

[3] Shott v. Strealfield, 2 Mood. & Rob. 8.

[4] Ellis v. Watson, 2 Stark. 453.

[5] Sangster v. Mazarredo, 1 Stark. 161.

[6] Gibbons v. Wilcox, 2 Stark. 43.

[7] Whitney v. Ferris, 10 Johns. 66; Tuttle v. Cooper, 5 Pick. 414; Contra, Evans v. Drummond, 4 Esp. 89; Heath v. Sansom, 4 B. & Ad. 175.

[8] Burgue v. De Tastet, 3 Stark. 53.

the registry of a ship made by A, stating that A and B are the owners, is not evidence of that fact as against B.[1] *A fortiori*, the act of third persons is no evidence to charge the defendants as partners, unless it can be proved that the defendants recognize such acts. Therefore, to charge two persons as joint-purchasers of a cart, an entry of such cart in the tax gatherer's book is not evidence, unless it be shown that the parties authorized the entry.[2]

Same class of evidence to sustain plea for non-joinder.

SEC. 774. It may here be observed that whatever is evidence to prove a person a partner in an action brought against him in that character, is likewise evidence for the same purpose on the trial of a plea in abatement for non-joinder of parties as defendants. Hence, on a plea in abatement for the non-joinder of A B as a defendant, his declarations, made before the action was brought, are evidence in support of the plea.[3] It may be remarked that under this plea the plaintiff may find it necessary to give evidence of dissolution.

Admissions of one partner admissible, when.

SEC. 775. As soon as evidence of the partnership is established, the acts, admissions, and declarations of one partner, in matters relating to the affairs of the partnership, will be evidence against the firm.[4] In this respect the partners are to be considered as one person, and, therefore, the rule will hold good, although the partner making the admission or declaration is not a party to the record. At first Lord Kenyon was inclined to doubt this doctrine, but he afterward held that in an action against one partner for money paid to his use, the admission of the debt by another partner was evidence against the defendant.[5] He likewise ruled, on another occasion, that if a *nolle prosequi* be entered as to one defendant who pleads his bankruptcy, an admission made by him before he obtains his certificate is evidence against the other defendants.[6]

Admissions after dissolution.

SEC. 776. Even where the partnership has been dissolved, we have

[1] Tinkler v. Walpole, 1 East, 226; Flower v. Young, 3 Camp. 240; Smith v. Fuge, id. 456.

[2] Weaver v. Prentice, 1 Esp. 369. See Strother v. Willan, 4 Camp. 24; Fraser v. Hopkins, 2 Taunt. 5.

[3] Clay v. Langston, 1 Mood. & Malk. 45.

[4] See D. Lord Kenyon, Grant v. Jackson, 1 Peake, 203; Smith v. Pickering, id. 69. As to the declarations of one joint-trespasser, see *post*.

[5] Thwaites v. Richardson, 1 Peake, 16

[6] Grant v. Jackson, 1 Peake, 203.

seen that an admission made by one of the *quondam* partners may be binding on the rest. But there seems reason to contend that statements by partners in the shape of admissions should be received with greater caution after the dissolution than during the continuance of the partnership, because the change in the situation of the parties may very materially affect the motives for making declarations concerning the contracts of the partnership. Upon considerations of this nature, it seems to have been held in an action of debt on a joint bond, that the admission made by a defendant in a suit filed against him after action brought, was not receivable against the co-defendant to the action.[1]

Admissions by agent after retirement of one partner.

SEC. 777. Where a change has taken place in the constitution of a firm by the retirement of some of its members, and the accession of other persons in their room, a letter written by the agent of the new firm, who was not the agent of the old firm, cannot be read as an admission against the retired members of the old firm, even where no notice was given of their retirement.[2]

What must be shown to hold the firm.

SEC. 778. We have already seen in what cases a firm is bound by the contracts of its individual partners. To recapitulate the evidence of such contracts would, therefore, be needless. But it may be observed, that the contract upon which the parties are sued must be shown, expressly or impliedly, to have been made for the joint benefit of all.[3] Though, as we have already seen, if, in an action against one of several partners, the defendant neglect to plead the non-joinder of his copartners in abatement, a joint contract may be given in evidence of the separate contract stated in the declaration. In an action against several defendants, after the dissolution of their partnership, by the indorsee of a bill of exchange purporting to have been drawn by the partners, and to bear date previous to the dissolution, the date of the bill, until the contrary be shown, must be taken to be the date of the drawing of it, consequently all the defendants, *prima facie*, will be liable, and

[1] Sullivan v. Evans, 2 Huds. & Bro. 461. Diss. Bushe, C. J.

[2] Jones v. Shears, 4 Ad. & Ell. 832. In this case the retiring partners were dormant as to the world in general, but not as to the party who contracted with them.

[3] If a man and his partner are separately sued for some demand, and both employ the same attorney, it seems clear that the attorney cannot sue the partners jointly for the amount of his bill. Hellings v. Gregory, 1 Car. & Payne, 627.

it will not be necessary for the plaintiff to prove that the bill was drawn and indorsed before the dissolution.[1]

Admission does not make person a partner — may show that he was not.

SEC. 779. A defendant who is sued in respect of any contract as a partner, and who intends to give in evidence that he was not a partner at the time the contract was made,[2] should, for that purpose, prove a previous dissolution. However, his subsequent acknowledgment that he was a partner, if in fact he were not so, will not render him liable to be sued at law by virtue of the original contract; though if, in addition to his acknowledgment, he gives a bill as a security for that transaction, this raises a new contract, upon which he may be sued.[3] It will not be necessary to recapitulate the various defenses which may be set up by a person charged as a partner, but we may shortly observe, that the defendant may prove a disclaimer of the alleged contract, and that he gave notice to the plaintiff that he would not be answerable. He may likewise give evidence that he was not a partner in the particular trade in which the transaction took place, and that the plaintiff knew that circumstance.[4] Or he may disprove the partnership altogether, which he may do without denying that he was engaged in the contract as servant or agent,[5] and it is immaterial to a defendant, who denies the joint contract, that his co-defendant has admitted it by suffering judgment to go against him by default.[6]

When person is estopped from denying a partnership.

SEC. 780. In some cases, however, a defendant may be estopped from saying that there was no partnership. Thus, in an action by the indorsee against the acceptor of a bill of exchange, purporting to be drawn by a firm consisting of several persons, if the declaration aver that certain persons using that firm drew the bill, but the evidence is that the drawer of the bill trades singly under that firm, and that he has no

[1] Anderson v. Weston, 8 Jur. 105.

[2] Ellis v. Watson, 2 Stark. 458. Where this defense is offered to an action against partners on a bill of exchange, a subsequent bill of exchange may be given as auxiliary evidence of the continuation of the partnership, and that although the subsequent bill be declared on; provided the plaintiff, by the terms of his particular, confine his right to recover to the first bill only. Duncan v. Hill, 2 Brod. & Bing. 682; 5 Moore, 567.

[3] Saville v. Robertson, 4 T. R. 120.

[4] Jones v. Hunter, Dan. & Lloyd, 215. In this case the non-liability in respect of the particular trade was attempted to be proved by parol; but the evidence was not admitted, there being a rough sketch in writing of the terms of the partnership, which had been assented to by the parties, though not signed by them, and only made with a view to future articles.

[5] Birt v. Hood, 1 Esp. 20.

[6] Eliot v. Morgan, 7 C. & P. 334.

partner, this is not a variance of which the defendant can take advantage, because, by accepting the bill, he is estopped from saying that it was improperly drawn.[1] So, where a bill is drawn by the firm upon and accepted by one of its members, in an action by the payee against the drawers, the defendants are estopped from setting up as a defense any irregularity in the drawing. Under such circumstances, proof that the bill was accepted is sufficient evidence of its having been regularly drawn.[2]

Defendant may show that admissions had no reference to partnership.

SEC. 781. Where the partnership of the defendant is not disputed, and the plaintiff, in order to fix him with the contract, gives evidence of the declaration or admission of the defendant's copartners, he may show that such declarations or admissions had no reference to the partnership. Thus, if he belongs to a society of persons who are both partners and part owners, he may give evidence that the admission in question did not relate to a subject of partnership, but of part ownership, in which case the admission of one is not binding on the others.[3] Again, he may show that the admission had reference to a contract made prior to his becoming a partner; for, before he can be affected by such admission, his responsibility must be proved; it cannot be presumed.[4] And he may in some cases show that such admission arose from mistake; and mistakes in the extent or nature of the interest of particular individuals not unfrequently arise in cases of partnership, in particular adventures.

Rule in Ridgway v. Philip.

SEC. 782. An instance of the line of defense last adverted to occurred in Ridgway v. Philip.[5] The plaintiff contracted with one Brown, the patentee of a draining machine, for the erection of one of those machines on the plaintiff's lands in Cambridgeshire. The draft agreement being drawn up in the name of Brown & Co., the plaintiff asked Brown what other persons beside himself composed the firm, upon which Brown wrote on the back of the draft, "John Broadhurst, Esq., and Dr. Wilson Philip." The contract being broken, the plaintiff brought his action for the breach againt Philip & Broadhurst; but previously to the action his son called on the

[1] Bass v. Clive, 4 Camp. 78; Wilde v. Keep, 6 C. & P. 235. In a late case, Littledale, J., reprobated the introduction of the doctrine of estoppel into transactions taking effect by the usage and custom of merchants. See Holdsworth v. Hunter, 10 Barn. & Cres. 455.

[2] Porthouse v. Parker, 1 Camp. 82.

[3] Jaggers v. Binning, 1 Stark. 64.

[4] Catt v. Howard, 3 Stark. 3.

[5] 1 Cr., M. & Ros. 415.

defendant, Broadhurst, and asked him whether Brown was correct in making the indorsement upon the draft of the agreement, to which Broadhurst replied in the affirmative, and stated that he had bought his original interest from the other defendant, Dr. Philip. In order further to fix Broadhurst as a partner, evidence was given at the trial that, while the engine was in progress, he attended very frequently at the manufactory to inquire how it was going on, and that he gave advice and made suggestions with regard to its construction. In answer to this evidence, an agreement or license from Brown and the other parties interested in the patent, to Broadhurst, was given in evidence on the part of the latter, authorizing Broadhurst to use the patent for the erecting of engines in certain parts of Cornwall only, and it was contended that the admissions of Broadhurst were to be taken with reference to the interest which he thus possessed in the invention, and not to any participation, either in the patent generally or in the particular transaction in question. Gaselee, J., who tried the action, left it to the jury to say whether Broadhurst, at the time he made the admission, was under a mistake; and whether the acts he was proved to have done did or did not afford a sufficient ground for supposing it to be a mistake; and with regard to those acts, he left it to the jury to say whether they were referable to a partnership in the patent in general, or in this particular transaction. The jury found a verdict for the defendants, on the ground that Broadhurst was not a partner; and the Court of Exchequer refused to grant a new trial.

When one partner may be called to prove partnership.

SEC. 783. The plaintiff, in an action against partners, may call one of the partners to prove his case, if the partner so called be not a party to the record, and if upon the whole it be to his interest to defeat the plaintiff's claim. Such a witness may even prove the partnership. Thus, in an action of *assumpsit* for goods sold and delivered to a steam yacht company, to which the general issue was pleaded, a witness, who was called by the plaintiff to prove that the defendant had a share in the concern, was held competent, although he admitted on the *voir dire* that he himself was jointly liable. "If the plaintiff recovers," observed Littledale, J., "the defendant will have contribution. If he fails, he may sue the witness for the whole, and the latter may then claim contribution from the defendant. To this it is answered, that in such an action he might not be able to establish that the defendant was a partner. But it must

be remembered that the admission of the witness was the only proof of his own liability; it was, therefore, only reasonable to take the whole of his evidence together, and that showed the defendant to be jointly liable."[1] So, in an action brought to charge A as a partner in a trading company, a witness, who was proved to be a shareholder by other evidence than his own, and, therefore, might *a fortiori* be considered interested in increasing the number of partners, was nevertheless held competent to prove that A was a partner.[2]

When the partnership is proved or admitted, the plaintiff may, in like manner, but with the same restrictions, call one of the partners to prove other parts of his case. Thus, in *assumpsit* on an attorney's bill, where the charges were for business done for two persons (partners) and one only was sued, and there was no plea in abatement, it was ruled that the other might be called as a witness for the plaintiff.[3] So, upon a plea in abatement, that the promises were made jointly with A B and others, and issue joined thereon, it was ruled that A B was a competent witness for the plaintiff, for even if the plaintiff were to succeed in this action, A B would still be liable to contribution to the defendants in case they could prove that he was really a partner.[4] Upon the same principle, in an action of *assumpsit* for the non-delivery of goods, and for money had and received, the defendant having pleaded in abatement, that the promises were made jointly with A and B, and not by the defendant alone, it was held that A was a competent witness for the plaintiff, to prove that the defendant was not authorized by the partners to make the contract, and that he received the money to his own use. In this case, the plaintiff having obtained a verdict, Lord Ellenborough said that the defendant was not thereby precluded from suing the other partners for contribution, provided he could establish by evidence his claim against them as partners. The record in this action would not operate as an estoppel against him on that occasion, he might resort to other evidence and prove them jointly partners in the transaction. If this were so, it was indifferent to the witness which way the verdict went. If, indeed, it should turn out that he was a partner, the verdict in favor of this plaintiff would rather be prejudicial to him, for he would then be

[1] Blackett v. Weir, 5 Barn. & Cres. 385; 8 Dowl. & Ryl. 142.

[2] Hall v. Curzon, 9 Barn. & Cres. 646. In Luckett v. Graham, which was an action against one of three obligors, a co-obligor was allowed to be a witness to prove the execution of the bond by the defendant. See 1 Str. 35.

[3] Fawcett v. Wrathall, 3 Car. & Pay. 305.

[4] Cossham v. Goldney, 2 Stark. 414.

liable to contribution, increased by the costs. In one way, therefore, the verdict would be indifferent, in the other, prejudicial.[1]

Interest of witness.

SEC. 784. If the witness has an interest inclining him to each of the parties, so as upon the whole to make him indifferent, he will be competent to give evidence for either party.[2] Thus, in an action against one of two joint makers of a promissory note, it was held that T S, the other joint maker, might prove the defendant's signature to the note. The reason given was that, if the plaintiffs recovered against the defendant, T S would be liable to him for contribution, or if they failed in this action, they might resort to T S for the whole, and then T S would be entitled to contribution from the defendant, so that either way T S stood indifferent.[3] So, where one partner drew a bill in the partnership firm, and gave it in payment to a separate creditor in discharge of his own debt, the Court of King's Bench held that, in an action by such creditor against the acceptor, either of the partners might be called, on the part of the defendant, to prove that the partner who drew the bill had no authority to draw it in the name of the firm, and that the bankruptcy of the partners would not vary the question as to the competency of the witness.[4] In this case the partner who drew the bill would have been liable to the plaintiff to the amount of his debt, if the plaintiff had failed in the action, and if the plaintiff had succeeded, he would have been liable to the defendant, the acceptor, and with respect to the other partner, though he would have been liable to the defendant if the plaintiff recovered, he would have had his remedy over against his joint partner.[5]

In a recent case, where an action was brought against the maker of certain notes which had been indorsed by A in the firm of A & Co., to the plaintiffs, as a security for advances made to A by the plaintiffs, it seems not to have been questioned that the plaintiffs might call B to prove the indorsement to the plaintiffs, although B had been a partner in the firm of A & Co., and had given A authority to indorse these notes for the purpose of winding up the concerns of the partnership.[6]

To party examined without consent.

SEC. 785. Where a partner is a defendant on the record, that fact

[1] Hudson v. Robinson, 4 Man. & Sel. 476.

[2] 1 Phil. Ev. 68.

[3] York v. Blott, 5 Man. & Selw. 71.

[4] Ridley v. Taylor, 13 East, 175.

[5] 1 Phil. Ev. 69. In most, if not all the States, the parties to a suit may be witnesses for or against each other.

[6] Smith v. Winter, 4 Mees. & Welsb. 454.

alone, in the opinion of many judges, has been an objection to his being called as witness to the plaintiff.[1] In Mant v. Mainwaring, Burrough, J., is reported to have said: "The general rule is that no party to an action can be examined but by consent; and all the parties to the record must consent; and without such consent none can be called. In this case the co-defendants objected to the examination of a defendant in behalf of the plaintiff, and, therefore, the witness is properly rejected." But it is to be observed that such consent has not always been thought necessary;[2] and, in the leading cases on this subject, as much stress seems to have been laid on the circumstance of the witness being interested as on that of his being a party to the record. Thus, in Brown v. Brown,[3] which was an action on a joint contract against two defendants, one having suffered judgment by default, it was held that he was not a competent witness for the plaintiff to prove that the other defendant was a party to the contract; for if the plaintiff should succeed he would be entitled to contribution from the co-defendant, and if the plaintiff should fail he himself would be liable to the whole demand. And the same observation is applicable to the case of Mant v. Mainwaring,[4] where it was held that a release from the plaintiff to the defendant under these circumstances would not render him a competent witness for the plaintiff.

The foregoing observations were written before the author had seen the case of Worrall v. Jones,[5] which seems to settle the question. That was an action of debt on a bond conditioned for the payment of rent to the plaintiff, brought against three persons, two of whom suffered judgment by default; the third pleaded that the tenancy under the agreement ceased in March, 1816, up to which time all rent had been paid. At the trial, one of the defendants, who had suffered judgment by default, was called to prove that the tenancy under the agreement continued till 1829. His testimony being objected to, the point was reserved for the opinion of the Court of Common Pleas, who decided that he was a competent witness. "No case," said Tindal, C. J., "has been cited, nor can any be found, in which a witness has been refused, upon the objection in the abstract, that he was a party to the suit; on the contrary, many have been brought forward in which parties to the suit, who have suffered judgment by default, have been admitted as witnesses against their own interest,

[1] Dallas, J., and Burrough, J., 8 Taunt. 141; Abbott, C. J., 5 Barn. & Cres. 887.
[2] Norden v. Williamson, 1 Taunt. 378; Doe v. Green, 4 Esp. 198.
[3] 4 Taunt. 752.
[4] 8 Taunt. 139; 2 Moore, 9.
[5] 7 Bing. 395; 5 Moore & Pay. 241.

and the only inquiry seems to have been in a majority of the cases, whether the party called was interested in the event or not; and the admission or rejection of the witness has depended on the result of this inquiry. We think, therefore, where the party to the suit, who has suffered judgment by default, waives the objection and consents to be examined, and is called against his own interest, there is no ground either on principle or authority for rejecting him."[1]

In an action *ex contractu* against one or more partners, a copartner cannot be admitted as a witness for the defendants. For he has a direct interest in defeating the action, inasmuch as in the event of its succeeding he is liable to contribution both for the money recovered and the costs.[2] And he cannot be rendered competent by the provisions of the stat. 3 & 4 Will. 4, c. 42, s. 26, for the reasons which will be stated hereafter.

And though one partner or joint contractor may have paid his share of the principal sum due, yet if any part of the interest remains unpaid, he is directly interested as to that;[3] and such direct advantage is not counterbalanced by the contingency of an action being brought against him in the event of the failure of the existing action. And even if the party proposed to be examined has retired from the partnership, it is not enough to show that the debt due to the plaintiffs whilst the defendant was a partner, has *prima facie* been discharged by the operation of the rule in Clayton's case, because the payments which give occasion to the application of the rule are not conclusive evidence of discharge, but evidence of appropriation only and liable to be rebutted by other evidence.[4]

The general rule is to be adhered to, although in many cases the evidence of a partner so called might, in some degree, tend to onerate himself. Thus, in an action of assumpsit for goods sold and delivered, the plaintiff having proved the sale of the goods to the defendant and to one J. S., who were partners in trade, Lord Kenyon held that J. S. could not be a witness for the defendant to prove that the goods were sold to himself, and that the defendant was not concerned in the purchase except as his servant, for, said Lord Kenyon, by discharging the defendant he benefits himself, as otherwise he will be liable to pay a

---

[1] See Gilbert's Law of Evidence, 130, 4th ed.

[2] Phil. Ev. 71; Bac. Abr., Evidence (b.); Co. Litt. 6; Young v. Bairner, 1 Esp. 103.

[3] Slegg v. Phillips, 4 Ad. & Ell. 852.

In most of the states, the parties may be witnesses and the circumstances of interest does not disqualify a witness, but may be shown to affect the degree of credibility to be attached to it.

[4] Wilson v. Hirst, 4 B. & Ad. 760.

share of the costs to be recovered by the plaintiff.[1] So, in an action against a part owner for work and labor, etc., in painting a ship, to which the defendant pleaded in abatement that there were other part owners not joined, and the plaintiff replied that the defendant had undertaken solely to pay, it was held that the defendant could not call the Master, who was also a part owner, to prove that he ordered the work to be done;[2] and, generally on the plea of abatement of the non-joinder of other joint contractors, one of the parties named in the plea is not a competent witness for the defendant.[3] Again, in an action against B to recover the price of goods sold and delivered to him, it was held clearly that A was not a competent witness to prove that he was in partnership with B, and that the goods were delivered on the partnership account in liquidation of a debt previously due to the firm from the seller. Probably there was no other witness, or the partnership ought to have been pleaded in abatement. The ground of the decision was, that if the seller had recovered a verdict against B, which he might have done but for the testimony of A, the latter would be liable to contribution.[4] In an action on a joint contract against two defendants, where one let judgment go by default, Lord Kenyon refused to admit him as a witness for the other defendant to negative the contract, for, if negatived as to one, it fails as to the other, and the plaintiff could not make use of the judgment by default against him.[5] So, in an action against one of two joint contractors, Lord Denman refused to admit the other joint contractor to prove that the consideration for the contract was illegal; for if the contract was proved illegal as against one, it might similarly in a subsequent action be proved illegal as against the other, and so both might get rid of the liability altogether, and this ruling was confirmed by the Court of King's Bench.[6]

But where one of several defendants is deprived of all interest in the event of the action, he may be examined as a witness for the co-defendants. Thus, if upon the retirement of a partner mutual releases of all demands are executed between him and remaining partners, the retiring partner may, though the accounts between him and

[1] Goodacre v. Breame, 1 Peake, 175; Hall v. Rex, 6 Bing. 181. Upon the principles upon which this class of cases has been decided, it has been held that the joint acceptor of a bill of exchange is not competent to prove a set-off in an action by the holder against the drawer. Mainwaring v. Mytton, 1 Stark. 88.

[2] Young v. Bairner, 1 Esp. 103.

[3] Hare v. Munn, 1 Mood. & Malk. 241.

[4] Evans v. Yeatherd, 9 Moore, 272; 2 Bing. 188.

[5] Brown v. Fox, 1 Phil. Ev. 78.

[6] Slegg v. Phillips, 4 Ad. & El. 852.

his late partners are still unsettled, be examined on their behalf in an action brought against them to recover a balance in which the retiring partner was interested.[1] So, where several persons have agreed to bear equally the expenses of a joint undertaking, not a partnership in trade, in an action brought against one of them, another of the contractors is a competent witness for the defendant if released by him, though the rest do not join in the release.[2]

Again, if one of several partners, defendants, plead his bankruptcy, and the plaintiff enter a *nolle prosequi* as to him, he may give evidence for the other defendants.[3] Therefore, in an action against A and B, on a bill drawn and indorsed in the name of the firm, B having pleaded his bankruptcy, and a *nolle prosequi* having been entered as to him, he was allowed, in defense of A, to give evidence that he had indorsed the bill to the plaintiff without A's privity, in discharge of his separate debt.[4] So, where A and B were partners, and C accepted an accommodation bill drawn in their name, and to an action against A and B the latter pleaded his bankruptcy, and a *nolle prosequi* was entered as to him, it was held that as A was, under the circumstances, barred of all claim upon B for contribution, in the event of the plaintiff's success, B was, therefore, disinterested, and might be called to prove that the bill was accepted for his own accommodation only, and not that of A.[5] So, where A and B were sued on a bill of exchange accepted by them while in partnership, and B pleaded his bankruptcy and certificate, and the plaintiff entered a *nolle prosequi* as to him, it was held that as A was not only entitled, but under an obligation to prove, and as the certificate was, therefore, a bar to any action for contribution, it followed that B, who had released his interest in the surplus of his effects, was a competent witness for A.[6] But it seems that a bankrupt partner, even after a *nolle prosequi*, cannot be called for the purpose of upsetting the action on a point of form, as, for instance, by disproving his partnership with other defendants at the time of the contract, the latter being really liable on the merits.[7]

---

[1] Wilson v. Hirst, 4 B. & Ad. 760, overruling upon this point Cheyne v. Koops, 4 Esp. 112; see Young v. Bairner, 1 id. 103.

[2] Duke v. Pownall, 1 Mood. & Malk. 430.

[3] 16 East, 171; Dans. & Lloyd, 215.

[4] Green v. Deakin, 2 Stark. 347.

[5] Moody v. King, 2 Barn. & Cres. 558; 4 Dowl. & Ryl. 30. In this case the bill was drawn a day or two after the partnership had ceased as between the partners themselves, and the court seems to have laid some stress on this circumstance; but it was immaterial, as the 49 Geo. 3, c. 121, s. 8, extended to partners as well as sureties.

[6] Aflalo v. Fourdrinier, 6 Bing. 806; 3 Moore & Payne, 743.

[7] Jones v. Hunter, Dans. & Lloyd, 215.

In the same manner, where a *nolle prosequi* is not entered, but a verdict is given for that defendant who pleads his bankruptcy, he may be admitted as a witness for the co-defendants. It appears, indeed, that Lord Kenyon refused to permit a verdict to be entered for a defendant, in order to obtain his evidence under such circumstances, his Lordship observing that in case of a verdict for the plaintiff, the bankrupt was liable to the costs of the action, and was, therefore, interested in the event.[1] But the general rule appears to be that where the debt is barred by the certificate, the costs, as accessory to the debt, are likewise barred, even though they may not be provable under the fiat.[2] Lord Kenyon's objection, therefore, appears to be no longer in force; and hence, in cases of this nature, the jury may be directed to find a verdict for the bankrupt defendant, and he may then be admitted as a witness for the co-defendants.[3] It has been held, however, that this is entirely at the discretion of the judge, and that although, upon issue joined, it may be clear from the evidence that the defendant who has pleaded his bankruptcy must have a verdict in his favor, yet he is not entitled to have that verdict recorded in the middle of the cause in order that he may be called as a witness for the co-defendants.[4]

Where three of several defendants suffered judgment by default, it was held that one of the three was a competent witness to produce on behalf of the fourth the partnership deed under which the four had been acting in their dealings with the plaintiff.[5]

A copartner of the defendant may likewise be examined in his behalf by consent of the plaintiff. But in a case where a defendant pleaded the non-joinder of his copartner in abatement, and, by consent of the plaintiff, called his copartner to prove the plea, and, upon examination, the copartner denied the partnership, it was held that although the defendant might call other witnesses to prove that fact, yet he could not offer in evidence his copartner's admission of the partnership contained in an answer in chancery, as, by that mode of proceeding, he discredited his own witness.[6]

Where the plaintiff wishes to object to the testimony of a witness on

---

[1] Raven v. Dunning, 3 Esp. 283.

[2] Ex parte Poucher, 1 Gly. & Jam. 385; and see the cases there cited; but see 4 Bing. 57.

[3] Bate v. Russell, 1 Mood. & Malk. 333. The witness had a release from the co-defendants, *ex majori cautelâ*.

[4] Emmett v. Bradley, 1 Moore, 332; Currie v. Child, 3 Camp. 283; Carpenter v. Jones, 1 Mood. & Malk. 196; but see Bate v. Russell, id. 333.

[5] Colley v. Smith, 4 Bing. N. C. 285; 5 Scott, 700.

[6] Ewer v. Ambrose, 3 Barn. & Cres. 746; 5 Dowl. & Ryl. 629.

the ground of his being a copartner with the defendant, he should ask the witness, on the *voir dire*, whether he is not a partner.[1] If he deny the partnership, it will be competent to the plaintiff to examine other witnesses in order to establish the partnership, if he think that such evidence will have weight with the jury.[2] But in order to deprive the defendant of a witness, on the ground just stated, a partnership must be satisfactorily *proved*. Therefore, where, to an action against a person as a trader, the defense was, that the business was carried on by A, and not by the defendant, and that the defendant only worked in A's shop as a servant, it was ruled that the plaintiff could not, by merely suggesting a partnership between A and the defendant, deprive the defendant of A's testimony to this fact.[3]

Evidence in action for tort.

SEC. 786. In an action against several for a *joint tort*, it is not necessary that the evidence should affect all the defendants; some may be found guilty, and others acquitted.[4] But, in a case where the plaintiff had proved all the defendants guilty of a joint trespass, and then proved a second trespass against three only, expecting afterward to implicate all in this second trespass, it was held that he had, by so doing, elected to waive the first, and, therefore, being unable to bring home the second trespass against more than the three, the others were acquitted, and it was held that they should be acquitted, before the three went into their defense.[5]

It seems to be scarcely settled how far, in actions of tort, the declarations of one defendant are to be received in evidence against another. In the King v. Hardwick,[6] Lord Ellenborough observed that when a joint trespass has been established, the declaration of one defendant as to the motives and circumstances of the trespass will be evidence against all who are proved to have combined together for the same object. But the doctrine contained in this dictum appears to be laid down too broadly, and a learned writer conceives that such declarations are only admissible as have been made with reference to a *concerted plan*, and in pursuance of a *common object*.[7] And this opinion has been adopted in a subsequent case. An action was brought

[1] Cheyne v. Koops, 4 Esp. 112.
[2] See Ewer v. Ambrose, *ante*, and 1 Phil. Ev. 131. Formerly, it was held that he could not resort to both methods to establish the partnership. 10 Mod. 151; Ambler, 593.
[3] Birt v. Hood, 1 Esp. 20.
[4] Nichol v. Glennie, 1 Mau. & Sel. 588; Holroyd v. Breare, 4 Barn. & Ald. 700. To find all guilty in trover, a joint conversion by all must be proved. 2 Phil. Ev., tit. "Trover."
[5] Wynne v. Anderson, 3 Car. & Payne, 596.
[6] 11 East, 385.
[7] 1 Phil. Ev. 96.

against several defendants for placing the flap of a cellar, for the purpose of unloading wine, so negligently that it fell upon the plaintiff, and injured his leg. One of the defendants having suffered judgment by default, a statement made by him was offered in evidence not only against himself, but also against the other defendants, and The King v. Hardwick was cited. Tindal, C. J. : "The statement is, no doubt, evidence for one purpose against the person himself, because the jury have to say what damage has been sustained, but the plaintiff wishes to go farther. It seems to me the authority relied on on both sides applies to a case where there is a common object to be furthered, but here there was no common object, it is mere negligence. You must make the parties joint agents for one common object before you can make the declarations of one who has suffered judgment by default evidence against the others." His Lordship then directed the jury that they were not at liberty to make use of the admission as against the other defendants.[1]

But, where a joint trespass has been proved to have been willfully committed by several defendants, then it appears that a declaration made by one of the defendants relative to that trespass is evidence against all. Accordingly, in a late case, where three defendants had jointly imprisoned the plaintiff, the declaration of one of the defendants, made some weeks after, in the absence of the others, tending to show that the imprisonment arose from malice, was ruled to be admissible in evidence, in an action for false imprisonment brought against all three.[2]

If a joint tort be committed by several partners, the plaintiff has his election to sue all or any of them. In trespass, if one whom the plaintiff designed to make use of as a witness be by mistake made a defendant, the court will, on motion, give leave to omit him, and have his name struck out of the record, even after issue joined; for the plaintiff can in no case examine a defendant, though nothing be proved against him.[3] But in trespass, one who suffers judgment by default is not a competent witness for the plaintiff.[4] In an information for a misdemeanor the plaintiff may enter a *nolle prosequi* as to one defendant and then examine him.[5]

But a *particeps criminis*, who is not made a defendant, may be a witness for the plaintiff, although left out of the declaration for that

[1] Daniels v. Potter, 4 Car. & Payne, 262; 1 Mood. & Malk. 501.
[2] Wright v. Court, 2 Car. & Payne, 232.
[3] B. N. P. 285.
[4] Chapman v. Graves, 2 Camp. 333, n.
[5] B. N. P. 285.

purpose.[1] It is remarkable that it should be so, as such witnesses are open to a strong objection in point of interest, for, in an action of trespass, a recovery against one of several co-trespassers is a bar to an action against the others. Yet, as Lord Tenterden observed, scarcely a circuit passes without an instance of a person who has committed a trespass being called to prove that he did it by the command of the defendant.[2] However, the circumstances under which a witness is so called mightily lessen his credit.[3]

It has been ruled that a defendant in an action of trover, who suffers judgment by default, may be a witness for the co-defendants, as he is not liable to the costs of the issue tried against the other, and is not himself released, whatever may be the event of that issue.[4] Moreover, if a material witness for a defendant in ejectment is made a co-defendant, and lets judgment go by default, or consents to let a verdict be given against him, he may be a witness for another defendant.[5] In an action of replevin against a broker, it has been ruled that a person who at the time of the distress was in partnership with the broker, is a competent witness for him.[6]

If in tort any person be arbitrarily made a defendant to prevent his testimony, the plaintiff shall not prevail by that artifice; but the defendant against whom nothing is proved shall be sworn notwithstanding, for he does not swear in his own justification but in justification of another. However, this rule is only to be understood where there is no manner of evidence against the defendant, for, if there be, his guilt or innocence must wait the event of the verdict.[7] If there be no case whatever against him, it seems, according to some authorities, to be in the discretion of the judge, whether the jury shall in the middle of the cause acquit him, in order to make him a witness for the other defendants.[8] And it has been ruled that he has no *right* to be acquitted for such purpose until all the other evidence for the defendants is furnished.[9]

We may conclude this section by referring to the statute 3

[1] Id. 286.
[2] 5 Barn. & Cres. 387.
[3] B. N. P. 286.
[4] Ward v. Haydon, 2 Esp. 553. See S. C., 2 Peake, 126. In a note to the latter report it is observed that the decision in this case is doubtful, inasmuch as Lord Kenyon supposed that the witness was only liable to costs down to the time of signing the interlocutory judgment, and no further; but that the practice is to tax the whole costs jointly against both defendants, so that a witness who has suffered judgment by default, as in the principal case, is most materially interested in absolving the other defendant from his liability.
[5] Dormer v. Fortescue, B. N. P. 285.
[6] Duncan v. Meikleham, 3 Car. & Payne, 172.
[7] B. N. P. 285.
[8] Davis v. Living, Holt, 275; Bouser v. Curtis, 3 Car. & Payne, 597, n.
[9] Wright v. Paulin, Ry. & Mood. 128.

and 4 Will. 4, c. 42, sect. 26, which renders certain witnesses competent who would otherwise be rejected on the ground of interest. That statute, "in order to render the rejection of witnesses on the ground of interest less frequent," enacts, "that if any witness shall be objected to as incompetent on the ground that the verdict or judgment in the action, in which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined; but in that case a verdict or judgment in the action, in favor of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him; nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him, or any one claiming under him." And by section 27, "the name of every witness objected to as incompetent, on the ground that such verdict or judgment would be admissible in evidence for or against him, shall at the trial be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterward entered on the record of the judgment, and such indorsement or entry shall be sufficient evidence that such witness was examined in any subsequent proceeding in which the verdict or judgment shall be offered in evidence."

The effect of this enactment is to make the witness competent where his only interest is that the verdict or judgment may be used for or against him.[1] Where he has a direct interest in the subject-matter of the action, or the result of the suit, or where he may afterward proceed or be proceeded against, without the production of the verdict or judgment, the statute does not apply.[2] It seems clear, therefore, that in most, if not all the cases which have been mentioned, in which the witness was held incompetent, and which, with but few exceptions, were decided before the passing of this act, the witness could not have been rendered competent by his name being indorsed on the record.

[1] Per Parke, B., 2 Mees. & Wels. 421. 671; Green v. Warburton, 1 Mood. &
[2] Bowman v. Willis, 3 Bing. N. C. Rob. 106.

CHAPTER XXXII.

OF NONSUIT; VERDICT; COSTS.

SEC. 787. Nonsuit, when directed.
SEC. 788. Verdict must be for or against all.
SEC. 789. Costs, who entitled to.

Nonsuit, when directed.

SEC. 787. The plaintiff will be nonsuited if he is unable to make out his case, either for want of evidence or want of law. If it be clear that, in point of law, the action will not lie, the judge at *Nisi Prius* will direct a nonsuit, although the objection appear on the record, and might be taken advantage of by motion in arrest of judgment, or on a writ of error.[1] There is this advantage attending a nonsuit, that the plaintiff, though subject to the payment of costs, may afterward bring another action for the same cause, which he cannot do after verdict against him.[2] In actions against partners, we have seen that the plaintiff may be nonsuited for the mis-joinder of defendants. Also, upon the trial of a plea in abatement, he may be nonsuited in case the plea be proved. Where all the defendants join issue, the plaintiff, if nonsuited as to one, must be nonsuited as to all.[3] And if the plaintiff neglect to bring the issue to trial, any one of the defendants may obtain a rule for judgment as in case of a nonsuit.[4] And if the plaintiff enter a *nolle prosequi* as to one, he may be nonsuited as to the other.[5] If one defendant suffer judgment by default, the plaintiff upon trial of issue joined by the other defendant may elect to be nonsuited. "Judgment by default," observed Lord Tenterden, "is either by *non sum informatus* or *nil dicit*. In the former case, the defendant's attorney having appeared, says that he

[1] 2 Tidd's Prac. 867.
[2] 2 Tidd's Prac. 868.
[3] Blake's case, 1 Sid. 378. In some of the states the court has no power to direct a nonsuit, but on motion may permit a party to become so.
[4] Jones v. Gibson, 5 Barn. & Cres. 768; 14 Geo. 2, c. 17. But the rule must be entitled in the cause against all the defendants. Temple v. Hamilton, Smith & Batty, 27.
[5] M'Iver v. Humble, 16 East, 109.

is not informed of any answer to be given to the action. In the latter, the defendant himself appears, but says nothing in bar or preclusion thereof, and the judgment proceeds; 'whereby the said A B remains undefended, wherefore the plaintiff ought to recover his damages.' It is, therefore, not inconsistent for a plaintiff who has obtained such a judgment against one of several defendants to say that he will not further prosecute his suit against another defendant."[1] It follows from this that where, in an action of *assumpsit*, one or two defendants suffers judgment by default, the other is entitled to judgment as in case of a nonsuit, for not proceeding to trial.[2]

Verdict must be for or against all.

SEC. 788. On the trial of an action *ex contractu*, where several are defendants, the jury must find a verdict against all, or for all.[3] But, on the trial of an action for a joint tort, the jury may find some guilty and acquit others. Thus, in trover or trespass several may be joined yet one only found guilty;[4] there cannot, however, be a nonsuit as to one and a verdict against the others.[5] In all cases it is necessary that it should be shown by the verdict that the jury have taken into consideration the point in issue. Therefore, where in *assumpsit* the defendant pleaded that the promises were made by him jointly with another, and issue was taken upon that fact, and the jury found by their verdict that the defendant promised, without stating whether he promised alone or jointly with another, it was held that this verdict was bad, because it did not distinctly pronounce upon the issue.[6]

On a verdict for the plaintiff the jury should regularly assess the damages. In an action against several defendants if some of them let judgment go by default and others plead to issue, there ought to be a special *venire*, as well to try the issue as to inquire of the damages—*tam ad triandum quam ad inquirendum*, and the jury who try the issue shall assess the damages against all the defendants.[7] In actions upon contract, as covenant, *assumpsit*, etc., the plea of one defendant, for the most part, inures to the benefit of all; for the contract being entire, the plaintiff must succeed upon it against all or none, and therefore, if the plaintiff fail at the trial upon the plea

[1] Murphy v. Donlan, 5 Barn. & Cres. 178; 7 Dowl. & Ryl. 619.
[2] Stuart v. Rogers, 4 Mees. & Wels. 649.
[3] Porter v. Harris, 1 Lev. 63.
[4] Nichol v. Glennie, 1 Mau. & Sel. 588; Holroyd v. Breare, 4 Barn. & Ald. 700; Sutton v. Clarke, 6 Taunt. 29.
[5] Revett v. Brown, 2 Moore & Payne, 18. Provision is now made by statute in nearly all the states that a verdict may be rendered *against* a part of the defendants and *for* a part.
[6] Bishop v. Kaye, 3 Barn. & Ald. 605.
[7] 11 Rep. 5.

of one of the defendants, he cannot have judgment or damages against the others, who let judgment go by default.[1] But in actions of tort, as trespass, etc., where the wrong is joint and several, the distinction seems to be this: that where the plea of one of the defendants is such as shows that the plaintiff could have no cause of action against any of them, there, if this plea be found against the plaintiff, it shall operate to the benefit of all the defendants, and the plaintiff cannot have judgment or damages against them who let judgment go by default; but where the plea merely operates in discharge of the party pleading it, there it shall not operate to the benefit of the other defendants, but, notwithstanding such plea be found against the plaintiff, he may have judgment and damages against the other defendants.[2]

If some of the defendants demur, and others plead to issue, the jury who try the issue shall assess the damages against all the defendants.[3] If the defendants sever in pleading, the jury who try the first issue shall assess damages against all with a *cesset executio*. In trespass, if the defendants join in pleading, and the jury find them all jointly guilty, they cannot assess several damages; on the other hand, if they find some guilty and acquit others, they can only assess damages against them who are found guilty.[4]

Costs, who entitled to.

SEC. 789. The plaintiff who succeeds has *prima facie* a right to costs in all cases where he was entitled to damages antecedent to, or by the provisions of the statute of Gloucester;[5] as in *assumpsit*, covenant, debt on contract, case, trover, trespass, replevin, ejectment, etc. However, by the provisions of the statute 43 Eliz., c. 6, if in a personal action, "not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery," it shall be certified by the judge that the debt or damages therein do not amount to 40*s*., the plaintiff shall have no more costs than damages, but less, at the discretion of the court. This statute has been holden to apply to all personal actions not specially excepted from it,[6] and the judge may certify, although one of the defendants suffer judgment by default.[7]

[1] Porter v. Harris, 1 Lev. 63; Hannay v. Smith, 3 T. R. 662.

[2] 2 Tidd's Prac. 895.

[3] Id.

[4] Id. 896. A defendant in an action of *tort* is entitled to be acquitted immediately after the close of the plaintiff's case, if there is no evidence against him. He is not bound to admit the issue of the cause generally. Child v. Chamberlain, 6 C. & P. 213.

[5] 6 Edw. 1, c. 1, s. 2.

[6] Dand v. Sexton, 3 T. R. 37.

[7] Harris v. Duncan, 2 Ad. & Ell. 158; 4 Nev. & M. 63.

By the 4 Jac. 1, c. 3, *defendant* is entitled to costs on a nonsuit or verdict in his favor, in all cases where the plaintiff would have been entitled to them if he had obtained judgment.[1] He is, likewise, under the provisions of other acts,[2] entitled to costs, either upon judgment of *non pros.* against the plaintiff for not declaring, or upon judgment in his own favor on demurrer, or in case the plaintiff does not recover the sum for which the defendant was, without probable cause, arrested.

The defendant is likewise, in certain cases, entitled to costs under the 8 Eliz., c. 2, s. 2, upon the discontinuance of the action by the plaintiff, and in tort, where there is no contribution between several defendants for costs, this enactment has been held to extend to the case of *nolle prosequi.* Thus, where in trespass against two defendants, one of them suffered judgment by default, and a writ of inquiry was executed as against him, and the plaintiff entered a *nolle prosequi* as to the other, the Court of Common Pleas held that the latter was entitled to costs.[3] On the other hand, where in assumpsit against two defendants one of them pleaded his bankruptcy, and the plaintiff entered a *nolle prosequi* as to him, and proceeded to trial and obtained a verdict against the other defendant, who pleaded the general issue, the Court of King's Bench held that the former was not entitled to costs.[4]

Now, however, by the stat. 3 and 4 Will. 4, c. 42, s. 32,[5] where several persons shall be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, or upon the trial of such action shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless the judge certify that there was a reasonable cause for making him a defendant.

On the authority of the several statutes to which reference has been made, the courts have by a general rule established that no costs shall be allowed on taxation to the plaintiff, on any counts on which he has not succeeded, and that the costs of all issues found for the defendant shall be deducted from the plaintiff's costs.[6] Hence, where in trespass a plaintiff failed against one of two defendants, and succeeded against the other, the successful defendant's costs were set off against the plaintiff's costs without regard to the alleged lien of the

[1] But this statute does not extend to actions brought by executors or administrators.

[2] 13 Car. 2, stat. 2, c. 2; 8 and 9 Will. 3, c. 11; 43 Geo. 3, c. 46; 3 and 4 Will. 4, c. 42.

[3] Jackson v. Chambers, 8 Taunt. 463.

[4] Harewood v. Matthews, 2 Tidd's Prac. 961.

[5] And see 8 and 9 Will. 3, c. 11.

[6] Reg. Gen. 74, H. T. 1853.

plaintiff's attorney under Reg. Gen., H. T., 2 Will. 4, the attorney being substantially the plaintiff.[1] So, where several defendants were sued in trespass, and a verdict was found for the plaintiff on some of the issues against some of the defendants, and against him on all the other issues, the plaintiff was held entitled to the balance only of the costs, after deduction of all the costs of all the defendants,[2] and where there are several defendants, and one of them gets a verdict, he will be entitled to all his separate costs, and also *prima facie* to an aliquot portion of the joint costs of the defense, unless the Master is of opinion that a smaller portion should be allowed.[3]

When one of several defendants lets judgment go by default, and the other pleads a plea which goes to the whole declaration, and shows that the plaintiff had no cause of action, if this plea be found for the defendant who pleaded it, he shall have costs, and being an absolute bar, the other defendant shall have the benefit of it and not pay costs to the plaintiff. But when the plea does not go to the whole, but is merely in discharge of the party pleading it, then the other party shall not have the benefit of that plea whether it be found for or against the plaintiff.[4]

Where there are several defendants who succeed in the action, the plaintiff may pay the costs to which of them he pleases. It is usual to tax the costs to the defendants jointly, leaving the distribution to themselves.[5] If the defendants fail, each of them is answerable for the whole costs.[6]

It has been already observed that a plaintiff cannot sue more than one joint debtor separately for the same demand.[7] In a case where separate actions were brought against several persons for the same debt, who (if at all) were jointly liable, the defendant in one action having paid the debt and costs in that action, the Court of King's Bench stayed the proceedings in the others without costs.[7]

---

[1] Pocock v. O'Shaunessy, 6 Add. & Ell. 867.

[2] Starling v. Cozens, 2 C. M. & R. 445; 1 Gale, 159.

[3] Griffiths v. Jones, 4 Dowl. Pr. C. 159.

[4] Per Bayley, J., Baylis v. Dynely, 2 Chit. 153, and see 2 Tidd's Prac. 986, and the cases there cited.

[5] Per Bayley, J., Dickins v. Jarvis, 5 Barn. & Cres. 531; see Smith v. Campbell, 4 Moore & Payne, 469.

[6] B. N. P. 335.

[7] Carne v. Legh, 6 Barn. & Cres. 124; 9 Dowl. & Ryl. 126.

CHAPTER XXXIII.

OF EXECUTION.

SEC. 790. Joint execution must be predicated on joint judgment.
SEC. 791. What may be taken on.
SEC. 792. Plaintiff may have several executions.
SEC. 793. Executions in favor of separate creditors.
SEC. 794. As to the interest passed by seizure and sale.
SEC. 795. As to the relief of the solvent partner against the effect of the execution.

Joint execution must be predicated on joint judgment.

SEC. 790. When a joint judgment has been given against several defendants, partners, the execution, which must agree with the judgment as to the parties, must also be joint,[1] for upon judgment against two, a separate *capias* cannot issue against each,[2] nor a *capias* against one, and an *elegit* against another.[3] But, though all are sued jointly, and a joint execution taken out, yet it may be executed against one only, for each is answerable for the whole, and not merely for his proportional part, and equity must be called in to make the rest contribute.[4] Moreover, if any of the defendants in a personal action die within a year after judgment, joint execution on the footing of this judgment may be had against the survivors.[5]

What may be taken on.

SEC. 791. In a joint action against partners, the sheriff may take in execution both joint and separate effects. Therefore, if there are any effects of either partner, and the sheriff return *nulla bona*, an action will lie against him. And if the plaintiff declare against the

[1] Penoyer v. Brace, 1 Ld. Raym., 244; 2 Wms. Saund. 72 i; Clerk v. Clement, 6 T. R. 526.
[2] Clerk v. Clement, 6 T. R. 525.
[3] Rol. Abr. 88; Bac. Abr., Execution (G).
[4] Per De Grey, C. J., 2 W. Bl. 947, and see D. Lord Eldon, 6 Ves. 119; Herries v. Jameson, 5 T. R. 556; Woolley v. Kelly, 1 Barn. & Cres. 68; Allen v. Wills, 22 Pick. (Mass.) 451; Newman v. Bailey, 16 id. 570.
[5] Penoyer v. Brace, 1 Ld. Raym. 244; 1 Salk. 319.

sheriff for a false return of *nulla bona* to a *fieri facias* against the goods of A and B, alleging that "although A and B had goods within his bailiwick, etc., yet defendant,"[1] etc.; this allegation is sustained, though the plaintiff do not prove that B had any goods, for such allegation is severable, the legal effect of it being that both or either of them had goods.[2]

Plaintiff may have several executions, but only one satisfaction.

SEC. 792. A plaintiff suing out execution for debt, damages, or costs, may at his election have a *fieri facias, capias ad satisfaciendum*, or *elegit* against the goods, person, or lands of the party chargeable.[3] Or he may have several writs of the same sort running at the same time, in order to take the defendant or his goods in different countries. If *nulla bona* be returned to a *fieri facias* or *non est inventus* to a *capias ad satisfaciendum*, or *nihil* to an *elegit*, the party may afterward sue out another writ of the same or a different species. He may likewise abandon one writ of execution before it is executed, and sue out another of a different sort. But, where the sheriff has taken goods in execution under a *fieri facias*, the plaintiff cannot sue out a *capias ad satisfaciendum* till the *fieri facias* has been returned, though he should have withdrawn his execution under it.[4] Execution by *capias ad satisfaciendum* is a satisfaction of the debt.[5] In a case where the plaintiff obtained judgment against two defendants, and sued out two several writs of *testatum fieri facias* at the same time into different counties, and the sheriff under each of them took possession of the goods of one of the defendants; it appearing that the plaintiff's object was merely to obtain payment of his debt, and that he was willing to allow the defendants the full benefit of all moneys levied under the writ in one county, before he would call on the sheriff to return the writ issued into the other, the Court of Exchequer refused to put the plaintiff to his election, which of the writs he would proceed under, and also refused to set aside the other for irregularity.[6]

The mode of seizing and sale by the sheriff — Executions in favor of separate creditors.

SEC. 793. By the law of England, the creditor of any one partner may take in execution that partner's interest in all the tangible prop-

---

[1] Per Lord Eldon, 6 Ves. 126.
[2] Jones v. Clayton, 4 Man. & Sel. 349.
[3] Bac. Abr. Execution (D), stat. 1 Vict., c. 110, s. 11.
[4] Miller v. Parnell, 2 Marsh. 78.
[5] See Harbert's case, 3 Rep. 12 a, note (c), ed. Thomas & Fraser; Ellis, Dr. & Cr., c. 13: 2 Tidd's Prac., tit. Execution.
[6] Cooper v. Rowe, Tidd's Pr., 9th ed. 995.

erty of the partnership.[1] He is to sell for such interest as the defendant has as partner, not for the degree of right which he may be found to have on the winding up of the affairs, otherwise the sale might be

[1] Per Lord Alvanley, 8 Bos. & Pull. 289.

In Church v. Knox, 2 Conn. 523; Swift, C. J., laid down what seems to be the true rule as to the interest of one partner in the partnership stock, and the rights of a separate creditor under a levy upon the interest of one partner therein. He said, "the ground taken by the plaintiff is, that the tangible property of tenants in common, and copartners, can be taken and sold on execution for the payment of their individual debts, that in case of a partnership, each partner is, in law, considered to be an owner, in proportion to the number of the whole, that the purchaser becomes tenant in common with the other partners and is entitled to the possession; of course, on analogous principles, a creditor may, by foreign attachment, take the same proportionable part of a debt due to the partnership for the private debt of an individual partner. The tangible property of tenants in common may be taken and sold by execution against either of them, such part can only be sold as belongs to the party against whom the execution issued; and the purchaser will become co-tenant with the rest. But this rule does not apply to the case of copartners * * * An execution against a partner for his separate debt can take only the interest of the partner, in the partnership property, subject to the partnership debts; that the interest of the partner, only, is sold, and not the effects. The purchaser will stand in the place of the partner; the interest taken will continue, subject to the same responsibilities; and the amount can be ascertained, only on a final settlement of the partnership accounts. Moody v. Paine, 2 Johns. Ch. (N. Y.) 548; Taylor v. Field, 4 Ves. Jun. 396; Barker v. Goodair, 11 id. 85; Dutton v. Morrison, 17 id. 209; The King v. Sanderson, 1 Wightwick's Ex. Rep. 50; 1 Madd. Chan. 112. This doctrine is not only supported by authority, but is founded in the plainest principles of justice. The creditor can, by a foreign attachment, take nothing but what the absconding debtor was entitled to; and the property of one man ought not to be taken to pay the debt of another. But the rule claimed by the plaintiffs would violate both these principles. It is well known that in partnerships the effects do not usually belong to the partners equally, in proportion to their number. Sometimes, one will advance the capital, which is to be returned, while the other is to transact the business; and the profits, only, are to be shared between them. The effects might be wanted, not only to pay the partnership debts, but, on a settlement of the accounts, the partner in the execution might be a debtor to the partnership. If, then, we consider them as tenants in common and permit a creditor to sell one-half to pay the separate debt of one partner, we shall, in many instances, suffer the property of one man to be taken, to pay the debts of another; and give to a separate creditor of a partner a right over the effects of a partnership, which such partner could not exercise; and if the purchaser should be allowed to take possession of the effects, he might dissolve, or destroy the partnership. The only mode of doing justice is to sell the interest of the partner, who is the debtor in the execution; and though this may be uncertain, and difficult to come at, yet this can be no reason, why a rule, manifestly unjust, should be adopted. The doctrine, then, contended for by the plaintiffs is not supported by precedent or principle; and furnishes no analogy applicable to the present case. It may be asked, on what ground could the judgment, in this case, be rendered for one-third of the debt due from the defendants to the partnership, of which the absconding debtor was one? There was no evidence respecting the state of the partnership concerns; what capital each partner advanced; what each owed; and whether the partnership was solvent. Suppose the whole debt due from the defendants should be wanted to pay the partnership debts, or, that Joseph Hart should be found a debtor, on settling his account, then the judgment could not be right. While the interest of Joseph Hart was a matter of uncertainty, how could a judgment be rendered for a sum certain? It is, however, insisted, that the defendants are bound to state the accounts of Joseph Hart, with the partnership, and ascertain the balance due to him. But this would be to require an

postponed for an indefinite time.[1] And it is laid down by Lord Holt that in an action against one of two partners the sheriff must seize all the goods, because the moieties are undivided, for, if he seize but a

impossibility; for they have no control of their books, and no possible legal mode of compelling a settlement of their accounts. It is further said, if the plaintiffs have recovered more than the proportion of Joseph Hart in this debt, and it should be wanted for the payment of partnership debts, the other partners may call them to account, and recover back such money. At this rate, a judgment may be rendered in favor of a man for a sum certain, with a liability to refund the whole, or a part of it, on some contingency. It is sufficient to state the proposition, to show the absurdity of it. What right can a court have to say, that a certain part of a debt due to a partnership may be taken to pay the private debt of a partner, in a suit where the partners are not parties; and then, if wanted to pay the debts of the partnership, to oblige them to resort to the creditor? But it further appears to me, from the nature of partnerships, that one partner cannot have a separate right, in any particular debt, or article of property, belonging to the partnership, liable to his individual debt; but all the effects are a joint interest; and each partner can have a separate interest only in his share, upon the winding up and settlement of the partnership concerns. It is said that, at this rate, the property of partners may be placed beyond the reach of their individual debts, by foreign attachment. If the legislature has not made provision, by which the actual interest of a partner, in the partnership property, can be reached, it would be proper for them, by a new law, to supply the defect; but this will not warrant a court to introduce a remedy, which violates the principles on which partnerships are founded, for contracts of this kind are recognized by law, and no principle ought to be adopted which may terminate in their utter destruction." It is true, that the doctrine in this case was established by a divided court, there being only a bare majority in favor of the rule established, but in a later case, before the same court, Witter v. Richards, 10 Conn. 37, the doctrine was reiterated and unanimously affirmed, and extended so as to prevent the creditors of a dormant partner from attaching his interest in the stock, even though the partnership creditors, at the time of giving credit to the firm, had no knowledge of his connection therewith. "That the partnership creditors," said Williams, J., "generally have a preference to the creditors of an individual partner, has not been contested. It was settled by Lord Hardwicke in West v. Skip, 1 Ves. 239. It was recognized in New York in Nicoll v. Mumford, 1 Johns. Ch. (N. Y.) 522; in Massachusetts, in Pierce v. Jackson, 6 Mass. 242, and by this court in Brewster v. Hammett, 4 Conn. 540. But it is claimed that, as this partnership was a dormant one, and as the creditors did not know of its existence, they ought to stand upon the same ground as separate creditors of Hutchinson whom they all trusted. Now, if the partnership creditors had done any act to hold out Hutchinson as the sole owner of the goods, or if there was any fraud in the case, or even if they could be made responsible for the declaration of Kinne (the other partner), there certainly would be some foundation for this argument. But no fraud is found * * * The partners, therefore, must stand upon their rights as recognized by a court of equity. And the rights of the separate creditors depend upon the interest which each partner had in the partnership property; and such creditor can take nothing but what his creditor had therein, Ex parte King, 17 Ves. 119, and neither partner has any thing separately in the *corpus* of the partnership property; but the interest of each is only his share of what remains after the partnership accounts are taken, Church v. Knox, 2 Conn. 523. And therefore, if a separate creditor takes out his execution against the partnership effects, he must take the undivided share in the same manner as the debtor himself had it, and subject to the right of the other partners. Taylor v. Fields 4 Ves. 396." See to same effect, Rice v. Austin, 17 Mass. 206; Morrison v. Blodgett, 8 N. H. 253; Tredwell v. Roscoe, 3 Dev. (N. C.) 50; Commercial Bank v. Wilkins, 9 Me. 33; Barber v. Hartford Bank, 9 Conn. 407; Place v. Switzer, 16 Ohio,

[1] Per Lord Denman, 4 Ad. & Ell. 131. Moody v. Payne, 2 Johns. Ch. 548. See Ex parte Smith, 16 Johns. 106;

moiety, and sell that, the other will have a right to a moiety of that moiety, but he must seize the whole, and sell a moiety thereof undivided.[1] So, in case of replevin, it was argued for the plaintiffs that

142; Douglass v. Winslow, 20 Me. 89; Mahley v. Lambat, 8 Miss. 318; Sitter v. Walker, Freem. Ch. (Miss.) 77; United States v. Hack, 8 Pet. (U. S.) 271; Ex parte Smith, 16 Johns. (N. Y.) 102; Fisk v. Herrick, 6 Mass. 271; Pierce v. Jackson, id. 271; Moody v. Payne, 2 Johns. Ch. (N. Y.) 548; Scrugham v. Carter, 12 Wend. (N. Y.) 131; Winston v. Ewing, 1 Ala. 129; Gibson v. Stevens, 7 N. H. 352; Page v. Carpenter, 10 N. H. 81; Cammack v. Johnson, 1 Green's Ch. (N. J.) 163; Howard v. Jones, 50 Ala. 67; Boss v. Estell, 50 Miss. 300; Luce v. Hartshorn, 7 Lans. (N. Y.) 331; Menagh v. Whitwell, 52 N. Y. 146; Burpee v. Burn, 23 Cal. 195; Conroy v. Woods, 13 Cal. 630; Bullock v. Hubbard, 23 Cal. 500; Cook v. Arthur, 11 Ired. (N. C.) 407; In re Smith, 16 Johns. (N. Y.) 102; O'Bannan v. Miller, 4 Bush (Ky.), 25; McCarty v. Emlin, 2 Yates (Penn.), 192; Deas v. Summer, 4 id. 477; Frazer v. Thorpe, 9 La. An. 518. The strict legal relation of partners to the partnership stock is not that of tenants in common. They are joint tenants so long as any outstanding obligations of the firm exist, and tenants in common only in the residue after all such obligations are paid. Rice v. McMartin, 39 Conn. 573; and this applies as well to real estate as to personalty. In Hiscox v. Phelps, 49 N. Y. 97, it was held that where land is deeded to the members of a copartnership individually, and paid for out of partnership funds, the land being used for partnership purposes, although the legal effect of the conveyance is to constitute the purchasers tenants in common, yet equity will treat the land as copartnership assets. The same rule applies where partnership funds have been expended in improving land so deeded, to the enhanced value of the land so improved—the partnership creditors take priority over the individual creditors—the creditors of a member who has contributed more than he was bound to contribute, are to be preferred to those of the other members, and the member who contributes more than his share is to be preferred to the other members, and their creditors to the extent of the excess contributed over his share. 1872, Deveney v. Mahoney, 23 N. J. Eq. 247. It is upon this theory that preference is given to firm creditors as to firm property, coupled with the fact that they, whose money or property has gone into the concern upon the joint credit of the partners, are equitably entitled to payment out of such joint fund, and in the attachment of the firm property, in equity are treated as prior creditors although their attachment of the property may be subsequent to that of separate creditors. Shedd v. Wilson, 27 Vt. 480; Russ v. Fay, 29 id. 386; Haskins v. Johnson, 24 Ga. 625. The preference extends to shoes in action or debts due the firm, as well as to other property, and a creditor of one partner cannot hold a debtor of the firm nor the other members of the firm as trustee of one partner to the extent of such partner's apparent interest in the debt. In equity he has no interest except that which exists after the firm debts are paid. Bullfinch v. Winchenbach, 3 Allen (Mass.), 161; Johnson v. King, 6 Humph. (Tenn.) 233; Covenly v. Brainard, 28 Vt. 739; Benson v. Ela, 35 N. H. 409. The partners may, as we have seen in a previous note, by a *bona fide* agreement, convert the joint estate into the separate estate of each partner; Allen v. Center Valley Co., 21 Conn. 130; Menagh v. Whitwell, 52 N. Y. 16; and when the joint interest is thus severed, the preference of the joint creditors is lost; Dimon v. Hazard, 32 N. Y. 65; Menagh v. Whitwell, *ante;* but, if the severance was fraudulently made, the preference still exists. Menagh v. Whitwell, *ante.*

[1] Heydon v. Heydon, 1 Salk. 392. In Burton v. Green, 3 Car. & Payne, 306, which was an action against the sheriff for a false return of *nulla bona* to a writ of *fieri facias* sued out against T C, it was proved that T C had one-third share in a colliery, and there were goods and fixtures belonging jointly to him and his two partners to more than three times the amount to be levied under the execution, and it was contended, on the part of the plaintiff, that the sheriff should have levied on this joint property to the extent of one-third. One ground of defense was, that partnership property could not be seized under a writ of *fieri facias* sued out against one partner only. It was not necessary, under the circumstances of the case, to enter further into this subject; but the case of Heydon v. Heydon seems to render such a defense untenable.

they were partners, and the defendant took the goods of both of them, to which it was answered that he must take the goods of both, to levy out the moiety of one partner.[1] On the other hand, upon judgment against one of two partners, and execution against the partnership effects, although the sheriff may seize, yet he cannot sell more than a moiety, for the property of the other moiety is not affected by the judgment, nor by the execution.[2] From these cases it follows that, although, ordinarily, when goods are seized by the sheriff, they cannot be again seized, and if sold under a second seizure the sale is void, yet, if A and B are partners, and the sheriff seize the joint effects for a separate debt of A, he cannot afterward return *nulla bona* in an action for a separate debt of B, and if he make such return, an action will lie against him.[3] Under a judgment against one partner the way in which the sheriff executes the writ in practice is by making a bill of sale of the actual interest.[4]

It follows, upon the principles above stated, that if the sheriff seizes goods in the apparent possession of A, in order to discharge A's debt, he has no right to relief under the Interpleader Act,[5] on the mere ground that B claims a partnership in those goods, because that act applies only to conflicting claims, by persons having adverse titles, and we have seen that, for the purpose of sale by the sheriff, B, though a partner with A, is not deemed to have any title to A's share. If, however, the execution creditor dispute the partnership, that is a case for the protection of the sheriff under the Interpleader Act.[6]

As to the interest passed by the seizure and sale.

SEC. 794. As soon as the goods are taken in execution, the partnership in goods so taken is at an end, and the *creditor* (not the sheriff) becomes tenant in common with the other partner.[7] The *sheriff*, however, has a special property in the goods, may, therefore, maintain trespass or trover for them,[8] and may be considered as a legal agent for the sale. When the goods are sold, the vendee will be tenant in common with the other partner.[9]

As to the relief of the solvent partner against the effect of the execution.

SEC. 795. It is laid down by Lord Hardwicke, and is clearly consistent with all the doctrines of partnership, that if a creditor of one part-

[1] Marriot v. Shaw, Com. Rep. 277.
[2] Jackey v. Butler, 2 Ld. Raym. 871.
[3] Backhurst v. Clinkard, 1 Show. 173.
[4] 2 Ves. & Bea. 301.
[5] Stat. 1 & 2 Will. 4, c. 58, s. 6.
[6] Holmes v. Mentz, 4 Ad. & Ell. 127.
[7] D. D. Lord Hardwicke, 2 Swanst. 587; Lord Alvanley, 3 Bos. & Pull. 289; Lord Tenterden, 3 Car. & P. 309.
[8] Gilbert's Executions, 15; 2 Wms. Saund. 47.
[9] Per Lord Holt, 1 Salk. 392.

ner takes out execution against the partnership effects, he can only have the undivided share of his debtor, and must take it in the same manner as the debtor himself had it, and subject to the rights of the other partner.[1] The question then is in what manner the rights of the other partner may be ascertained, and it seems that an account for that purpose may be taken at law, that is to say, in the Court of King's Bench as well as in equity.

We have seen that in ordinary cases under an execution against partnership effects for a separate debt, the sheriff sells the undivided share of the debtor without reference to the partnership account. But, to use Lord Eldon's words, it is difficult to maintain this to be an equitable proceeding, if indeed a due proceeding at law, that a creditor of one of two partners should, without any attention to the rights of the partners themselves, take one-half of a chattel belonging to them as if it were perfectly clear that the interest of each was an equal moiety. On the other hand, it may be represented that the world cannot know what is the distinct interest of each, and, therefore, it is better that the apparent interest of each should be considered as his actual interest.

But whatever be the merits or demerits of this mode of execution, when the proceeding is unopposed by the solvent partners, it ceases to be common justice when the latter demand that an account shall be taken of the partnership, that the interest of the debtor partner shall be ascertained, and that his interest alone shall go in discharge of his separate debts. In order to meet cases of this nature, the Court of King's Bench has sometimes directed an account between the parties professing to sell only the actual interest of the debtor partner in the goods taken in execution.

This practice began with Lord Mansfield in the case of Eddie v. Davidson.[2] There the defendant Davidson was partner with one Bernie, against whom a commission of bankrupt had issued, but before the bankruptcy the plaintiff had sued out execution on a bond

[1] Skip v. Harwood, Cowp. 451. So, upon an extent against one of several partners for a separate debt, the Crown has no right to retain more than that partner's share of the partnership property. Rex v. Sanderson, 1 Wightwick, 50; Rex v. Rock, 2 Price, 198; D. Hullock, B., Rex v. Hodge, 13 id. 551. However, where partnership property is seized under an extent for a debt due from one of the firm, who on taking the accounts is indebted to the partnership, the court will not on motion grant an *amoveas manus* without a previous reference to the remembrancer. Rex v. Rock, *supra*.

[2] 17 Ves. 206.

[3] Doug. 650. Before this period it was laid down by Lord Holt that the debtor's copartner had no remedy at law otherwise than by retaking the goods if he could. Pope v. Haman, Comb. 217.

of the defendants for 700*l*, and the sheriff had levied on the partnership effects. Bernie's assignees obtained this rule to show cause why the sheriff should not pay them a moiety of the money arising from the sale of the goods so taken in execution, upon an affidavit of Bernie's, that he was entitled to an equal share of the partnership effects as partner with Davidson. The plaintiff's affidavit, on showing cause, denied that Bernie had an equal share in the partnership effects, and stated that he had embezzled the joint stock to a considerable amount. The court directed that it should be referred to the Master to take an account of the share of the partnership effects to which Bernie was entitled, and that the sheriff should pay a part of the money levied, equal to the amount of such share, to the assignees.

The equity administered in this case was clearly incomplete, if the intention was merely to ascertain the gross share of the bankrupt partner, deducting for embezzlements and to pay his assignees the amount of that share out of the money levied. Mr. Justice Chambre seems to have thought that the decision depended in a great measure on the circumstance that both parties consented to the sale and account. No objection, he says, was made to the sale by the party applying, or to the account by the party levying.[1] But this position seems doubtful, and in a subsequent case before Lord Kenyon a similar account was taken without the consent of the parties.[2]

Upon the whole, these cases seem to be the foundation of various observations to be met with in Lord Eldon's judgments, in all of which he expresses an unfavorable opinion of the accounts so taken at law. "If the courts of law," he says, "have followed courts of equity in giving execution against partnership effects, I desire to have it understood that they do not appear to me to adhere to the principle, when they suppose that the interest can be sold, before it has been ascertained what is the subject of sale and purchase. Courts of law have repeatedly laid down that they will sell the actual interest of the partner, professing to execute the equities between the parties, but forgetting that a court of equity ascertained previously what was to be sold. How can a court of law ascertain what is the interest to be sold, and what the equities depending upon an account of all the concerns of the partners for years?"[3]

---

[1] 3 Bos. & Pull. 288, and see Mr. Serj't Frere's note, Doug. 650.

[2] At least without their real consent. See the case as stated by Best, Serj't, in Parker v. Pistor, 3 Bos. & Pull. 288.

[3] Waters v. Taylor, 2 Ves. & Bea. 301; see, also, Barker v. Goodair, 11 Ves. 78; Young v. Keighly, 15 id. 557; Dutton v. Morison, 17 id. 206; In re Wait, 1 Jac. & Walk. 605.

The difficulties in taking these accounts at law, so frequently mentioned by Lord Eldon, occurred also to Lord Alvanley. Accordingly, on the authority of two cases decided by the latter learned judge, the Court of Common Pleas seems to have declined entertaining accounts of this nature. In the former of these cases a *fieri facias* had issued against one of several partners, and that court would not, at the request of the partnership creditors, delay the execution of the writ until an account should be taken of the partnership property. They observed that it was a very plain case at law, and that all the difficulties were to be encountered in equity.[1] In the other case[2] a rule had been obtained, calling on the plaintiff to show cause why it should not be referred to the Prothonotary to inquire if the defendant had any, and what, interest in the effects and premises seized by the sheriff, under an execution at the suit of the plaintiff. The application was made by all the copartners of the defendant, in number twenty-five, who stated that the defendant was indebted to the concern in more than the amount of his share. But the court discharged the rule, and Lord Alvanley expressed a hope that this would be the last application to that court of a similar nature.

Upon the whole, where the partnership has not long been established, or where the concern is so small that the greater part of its effects have been taken in execution, so that what remains may be easily valued, there seems no sound reason why the accounts under such execution should not be taken at law. On the contrary, where the partnership has been carried on for a series of years, its business branching out in various directions, perhaps to all quarters of the globe, its property and its debts not only increasing in magnitude, but assuming different shapes, according to the modes in which the former is invested, and the form or circumstances in which the latter are contracted—there it seems clear that, if an execution for a separate debt should occur of so extensive a nature that the solvent partners are compelled to resist it, they must resort for relief to a court of equity, "equity having the means of taking the complicated accounts of the partnership and reducing the concern into that state in which the property would be divisible as a clear surplus."

Where, therefore, the separate creditor of one partner has taken partnership goods in execution, in discharge of his separate debt, the other partners may file their bill against the creditor, the debtor

[1] Parker v. Pistor, 3 Bos. & Pull. 288. [2] Chapman v. Koops, 3 Bos. & Pull. 289.

partner, and the sheriff, praying a general account of the partnership, and payment of what is due to them, and that the creditor and the sheriff may be restrained from proceeding under the execution, and selling the stock and effects; and a court of equity will give relief accordingly.[1]

---

[1] See 1 Madd. Ch. 131; Eden on Injunc. 81; Bevan v. Lewis, 1 Sim. 376; Lowndes v. Taylor, 1 Madd. 423; Newell v. Townsend, 6 Sim. 419. Same relief in favor of the assignees of bankrupt partners. Taylor v. Field, Wats. Partn. 100; 15 Ves. 559; 4 id. 396.

The creditors of a partnership cannot in equity proceed for relief against the sale of the interest of one partner in the firm until they have in some manner acquired a lien thereon by attachment or levy. Greenwood v. Brodhead, 8 Barb. (N. Y.) 596. The mere fact that he has a legal claim against the firm, which he may be unable to collect if the separate creditor is allowed to proceed to enforce his claim, gives him no claim to the interference of a court of equity. Freeman v. Finnall, 1 S. & M. Ch. (Miss.) 627; Robb v. Stevens, 1 Iowa, 198; Reese v. Bradford, 13 Ala. 847. If they desire to secure the aid of a court of equity they must acquire a lien thereon either by an attachment, levy, judgment, or some other mode provided by law. In those states where attachment upon *mesne process* are not permitted they must pursue their claim to judgment in order to obtain a lien upon the real estate. Greenwood v. Brodhead, *ante*, and as to personal property must take out execution and levy the same thereon. Lawton v. Levy, 2 Edw. Ch. (N. Y.) 199; Young v. Freer, 9 N. J. Eq. 466; Griffin v. Orman, 9 Fla. 53; Sanderson v. Stockdale, 11 Md. 573; Mittnight v. Smith, 17 N. J. 262; Parish v. Lewis, Freem. Ch. (Miss.) 307; Treadwell v. Brown, 43 N. H. 290; Pearson v. Keedy, 6 B. Monr. (Ky.) 129. Partnership creditors, as such, have no lien on partnership effects for payment of partnership debts until they have obtained judgment and issued execution. But as each partner has a lien on the partnership effects to pay partnership debts, this lien may be made available in favor of the creditors. But as the creditors have no lien, if their debts are not reduced to judgment, they cannot come into chancery for relief. Reese v. Bradford, 13 Ala. 847.

In Mississippi it is held that in order to reach equitable assets the creditor must show he has obtained judgment at law and a return of execution on property, and no state of facts will excuse the omission of such a return. Parish & Co. v. Lewis, Freem. Ch. (Miss.) 307. Where one partner dies, the survivor cannot be sued in chancery to subject choses in action until judgment and execution returned no property, nor to set aside an assignment. Pearson & Henderson v. Keedy, 6 B. Monr. (Ky.) 129.

An exception exists, however, to this rule, where the firm is dissolved either by the death or retirement of a partner, and the survivor or remaining partners are insolvent; Vance v. Cowing, 13 Ind. 460; or where it appears that the property, or a part of it, was purchased from or improved by funds obtained from the creditor seeking relief, and the partners are fraudulently preferring other creditors, or has been fraudulently disposed of by them. Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 58; Sanderson v. Stackdale, 11 Md. 573. In Bank of St. Mary's v. St. John, 25 Ala. 567, the note holders of a foreign banking corporation which has suspended payment and become insolvent, may, without first obtaining judgment at law, proceed in equity against the bank, its directors, stockholders and agents, charging them with fraud and misapplication of the assets and seeking a discovery and account. Such a bill may be sustained under the general powers and jurisdiction of the court, which regards the capital stock of the company and all its assets as a trust fund for the payment of its creditors, and the directors, stockholders and agents as trustees. Such a bill may also be sustained under the attachment law of 1846. If a president of a foreign corporation is required by its charter to be a resident of the state in which it is located, when sued by the creditors in Alabama, he cannot be heard to deny the character in which he held himself out to the world, nor aver that he was not qualified to hold the office by reason of his residence in Alabama. The surrender to a bank agent of its notes, and the acceptance from him of his draft on a third party, is but the substitution of

If, in cases of this nature, execution be executed before an injunction can be obtained, the court will stay the money in the hands of the sheriff. For this purpose, also, the sheriff should be made a party

one security for another, and does not extinguish liability on the notes unless drawn in good faith and accepted as payment. In Washburne v. Bank of Bellows Falls, 19 Vt. 283, some creditors of a partnership on behalf of themselves and such other creditors as would join, etc., filed a bill in chancery, setting forth that they were creditors of an insolvent firm named A. Lawton & Co.; that plaintiffs had attached the property of the firm for payment of partnership debts; that creditors of the individual partners had also attached firm property to pay individual debts; and asking that the property might be sold and proceeds applied to satisfy copartnership debts. It was held that the copartnership must prevail (over separate creditors) by virtue of a lien which a partner is supposed to have by implied contract upon all the partnership effects until all the partnership debts are paid. By calling in aid this equity, the partnership creditors are enabled to maintain their claims. The fund made under such proceedings is to be distributed pro rata among the creditors. Bardwell v. Perry, 19 Vt. 297. The fact that a separate creditor has levied upon, and sold the interest of his debtor, does not defeat equitable relief. The purchaser does not acquire any greater interest than his debtor had which is simply such interest as remains, after the partnership claims are fully satisfied Little v. Walker, Freem. Ch. (Miss.) 78. The other partners may bring a bill to enjoin the sale of one partner, until an account is taken and the exact extent of such interest can be ascertained, and if it turns out that all the property is required to pay the firm debts, the injunction will be made absolute. Place v. Switzer, 16 Ohio, 143; Sutcliffe v. Dorman, 17 id. 185; Schraggham v. Carter, 12 Wend. (N. Y.) 134; Williams v. Smith, 4 Bush (Ky.), 540. In Sanders v. Young, 31 Miss. 112, what would seem to be the true rule was established. In that case, it was held that the legal interest of a partner may be levied on and taken possession of by the sheriff on execution or attachment, which is the partner's proportionate share of the partnership property, and not his share of what remains after the firm debts are paid, but that the solvent partners may, while the sheriff is proceeding, file their bill in equity, and upon proper showing, limit the creditor to the actual interest of such partner, after a settlement of the partnership debts. In Hubbard v. Curtis, 8 Clarke (Iowa), 13, it was held that after such a levy or attachment, the solvent partner might file his bill in equity against the other partner and the sheriff for a settlement of the partnership accounts and the appointment of receiver, and that the sheriff would be directed to turn the property over to the receiver, and that the creditor and sheriff would be enjoined from proceeding under the execution until the partnership affairs were fully settled. See, also, to same effect, Watson v. Gobley, 18 B. Monr. (Ky.) 468; Jones v. Thompson, 12 Cal. 199. In some states it is held that, in order to warrant the interference of a court of equity, it must be stated in the bill that the partnership is insolvent, or that after the payment of partnership debts there will be nothing remaining for him, Johnson v. Sanford, 13 Conn. 467; Mowbray v. Lawrence, 13 Abb. Pr. (N. Y.) 318; Reed v. Johnson, 24 Me. 322; but it is certainly difficult to see how this can affect the rights of the parties in the first instance. Is it necessary that the rights of the partners shall be jeopardized and imperiled simply because they are unable to state that the firm is insolvent? It would seem rather that the true ground of interference is the right of the partners to have the firm debts first paid out of the joint property, and that, too, whether the firm is solvent or insolvent, and that it is simply absurd to hold that the right only exists where the firm is insolvent. It is held, even by the courts that hold the doctrine stated above, that the interest of each partner in the partnership stock is simply that moiety remaining after the partnership debts are paid, which his interest in the capital bears to the whole capital invested. If this is so, it is extremely difficult to understand how his copartner's right to have the firm debts first paid out of the firm property can in any measure be dependent upon the question of solvency or insolvency. It is a right, and as such should be enforced. Equity it is said postpones the debts of separate creditors, until after the firm

to the suit in equity, by original bill, if the money were in his hands at the time the injunction issued, and by supplemental bill if, at that period, they were yet to be converted into money.[1] At any rate, he should be made a party if he acts in a manner hostile to the interests of the plaintiff.[2]

Where partnership goods have been seized for a separate debt, and it is doubtful whether they ought to be sold, the debtor's copartners objecting to the sale, it has been said to be the safest course for the sheriff to put some person in possession of the defendant's share as vendee, leaving him and the parties interested to contest the matter in equity, where a bill might be filed, stating that he had taken possession of the property, and praying that it might not be disposed of until all the claims were arranged.[3]

---

debts are paid, upon the application of a solvent partner, or a firm creditor having a lien upon the property, and the creditor of an individual partner takes only the interest of his debtor in the residue. If that be so, how can the question of solvency affect the matter? The rights of the parties should control. See Morrison v. Blodgett, 8 N. H. 253; Tappan v. Blaisdell, 5 id. 193; Page v. Carpenter, 10 id. 81; Witter v. Richards, 10 Com. 27; Barber v. Hartford Bank, 9 id. 407. When one partner sells out his interest in the stock of a firm to a new partner, debts contracted by the new firm must be first paid out of the goods afterward purchased, and the old creditors out of the proceeds of the goods on hand at the time when the new partner went in. Hurlburt v. Johnson, 74 Ill. 64. If any portion of the property of a firm on hand was formerly the individual property of one of the firm, his individual creditors, who gave him credit during the period he owned it, will be entitled to priority over the firm creditors. Hurlburt v. Johnson, 74 Ill. 64. Private property of partners in equity goes first in satisfaction of private debts, and the balance will be applied to payment of partnership debts. Bailey v. Kennedy, 2 Del. Ch. 12.

[1] Franklyn v. Thomas, 3 Mer. 235; Hawkshaw v. Parkins, 2 Swanst. 549.

[2] Id., and consider Axe v. Clarke, 2 Dick. 549; 3 Mer. 234.

[3] Parker v. Pistor, 3 Bos. & Pull. 288.

CHAPTER XXXIV.

OF SUITS IN EQUITY BY AND AGAINST PARTNERS.

SEC. 796. Who should be parties plaintiff.
SEC. 797. When suit may be maintained against partners.
SEC. 798. Who should be made defendants.
SEC. 799. When separate creditors may bring suit for administrator.
SEC. 800. Who must answer.

Who should be parties plaintiff.

SEC. 796. It is obvious that the subject of suits in equity by partners can involve but little that is not incident to suits by individuals. One instance of a bill peculiar to partners is where the majority of the firm seek to restrain execution against the partnership effects for the separate debt of one partner.[1]

[1] *Suits in equity.*—Suits by and against partnerships for the specific performance or the rescission of a contract for taking agency accounts for repairing breaches of trust, (see Blair v. Bromley, 3 Ha. 542, and 2 Ph. 354), as to recovering money in equity from living partners who might have been sued at law, as well as for other matters, are by no means unusual, and a suit by a creditor of a firm to obtain payment out of the estate of a deceased partner is a matter of almost daily occurrence. When a company has entered into a contract to pay money out of its funds, a suit in equity is maintainable by the creditor against the company, although he might have sued the company at law, for the remedy by suit in equity on such a contract is more complete than the remedy at law. See Robson v. M'Creight, 25 Beav. 272; Law v. The London Indisputable Pol. Co., 1 K. & J. 223; Durham's case, 4 K. & J. 517; Talbot's case, 5 De G. & S. 386. As a general rule a suit by or against an ordinary partnership will be defective for want of parties, unless all the partners are before the court. But if the number of partners is considerable, some of them may sue on behalf of themselves and their copartners for the purpose of enforcing a right common to them all. Small v. Atwood, Younge, 456, *et seq.*; Fenn v. Craig, 3 Y. & C. Ex. 216; Clay v. Rufford, 8 Ha. 281, and see Douglas v. Horsfall, 2 Sim. & Stu. 184; Lloyd v. Loaring, 6 Ves. 773. Moreover, owing to recent improvements in the law, trustees for a firm may sue and be sued in equity in respect of real or personal estate vested in them, without making the members of the firm, or any of them as such, parties. 15 & 16 Vict., c. 86, s. 42, rule 9, and see Horsley v. Fawcett, 11 Beav. 565. In other cases, however, trustees for partnerships do not represent them in equity, and suits by or against the trustees on behalf of the firm will still be objectionable in point of form, unless the partners or some of them are also before the court. See Douglas v. Horsfall, 2 Sim. & Stu. 184; Fenn v. Craig, 3 Y. & C. Ex. 216.

Some of a firm may sue on behalf of themselves and the others for an ac-

Where a bill is filed by partners to enforce a partnership demand, all the partners must be parties to the suit, unless they are so numerous that it would be inconvenient to join them, in which case the bill may be filed by some of them on behalf of themselves and all others

---

count, if the members are numerous, and they have a common interest in the matters in question between the firm and the person sued. Gordon v. Pyne, 3 Ha. 223; Lund v. Blanshard, 4 id. 290. And an agent of the firm may be sued for an account by all the partners, although he only knew of one of them, and was employed by and has transacted business with that one alone. See Killock v. Greg, 4 Russ. 285; Anon., Godb. 90. At the same time an agent is only liable to account to his principal, and therefore if a person has been employed by one partner only as principal, or has been induced by that partner to believe that he alone was the principal, in such a case the other partners have no right to call the person so employed to account with them. See Killock v. Greg, 4 Russ. 285; Maxwell v. Greig, 1 Coop. Ca. in Ch. 491. On the other hand, if a person has throughout dealt with some partners only, and has all along treated them as principals, he can be compelled by them to account, and he cannot successfully insist that the other partners ought to be partners to the suit. Benson v. Hadfield, 4 Ha. 32; and see Aspinwall v. The London and N. W. Rail. Co., 11 Ha. 325.

A surviving partner may sue an agent of the firm for an account without making the executors of the deceased partners parties, Haig v. Gray, 3 De G. & Sm. 741, for in equity, as well as at law, the surviving partners are the proper persons to get in and give receipts for debts owing the firm. See Philips v. Philips, 3 Ha. 281; Brasier v. Hudson, 9 Sim. 1. Where it is necessary for a stranger to sue a partnership or unincorporated company in equity, it seems that if the right which he seeks to enforce is a right against the whole body, and one which all the members thereof have a common interest in opposing, he need not, if those members are numerous, make them all parties to the bill; it will be sufficient if he makes so many of them parties as to insure a fair and honest trial of the questions in dispute. See Adair v. The New River Comp., 11 Ves. 429; Meux v. Maltby, 2 Swanst. 277; Fenn v. Craig, 3 Y. & C. Ex. 216; Cullen v. Duke of Queensbury, 1 Bro. C. C. 101, and 1 Bro. P. C. 396; The City of London v. Richmond, 2 Vern. 421. But in a suit against some only of the members of a large partnership or company, difficulties occasionally arise which prevent the plaintiff from obtaining all that he is entitled to, even though a decree is made in his favor. The case of Meux v. Maltby, 2 Swanst. 277 (see, too, Lund v. Blanshard, 4 Ha. 290, where an injunction restraining a defendant from suing the plaintiffs was held not to preclude the defendant from suing other persons on behalf of whom the plaintiffs filed their bill), illustrates this. A suit was there instituted against the treasurer and the directors of a company, to obtain the benefit of an agreement made with the plaintiff by the former owner of property which had become vested in the company. The agreement was an agreement for a lease and the court made a decree in the plaintiff's favor, but found itself unable to decree the execution of any lease to him. The defendants had no power to convey the legal estate in the land, and all the court could do was to declare the plaintiff entitled to a lease and to restrain the officer from bringing any action to disturb the plaintiff's possession. Although a suit in equity against some only of a number of persons having a common interest may be sustained, and such a suit may be more advantageous than an action at law, which is liable to be met by a plea in abatement, it seems that a person seeking to enforce a legal right against a company has no *locus standi* in a court of equity, merely because he cannot conveniently proceed at law. In Allison v. Herring, 9 Sim 583, a solicitor who had been engaged by a number of persons to obtain an act for constructing a dock, and who had paid considerable sums out of his own pocket to surveyors, engineers and others, filed a bill against some of the persons by whom he had been employed, for an account and payment. The bill alleged that the other persons liable were numerous; that some were out of the jurisdiction, and some were dead, and that the representatives of the latter were unknown. The defendants put in a demurrer, which was allowed, on the ground that the plaintiff's remedy was at law. This case must not be confounded with those

the partners.[1] If any of the partners die, it may be doubted whether it is necessary to make the personal representative of the deceased a party,[2] and it is evident that there are cases in which that course has not been adopted,[3] and perhaps it may be stated that in an ordinary case it is not necessary to take this course.[4] Where, however, A & B deposited with a firm of which A was a member the title-deeds of an estate of which they were joint owners, as a security for a debt due from them to the firm, and A died intestate, it was held that A's personal representative was a necessary party to a bill filed by the surviving partners of the firm against B, and the heir of A, for a sale of the estate.[5]

Where an action is brought against some only of the members of a partnership, all the members may file a bill of discovery in aid of the defense to the action at law, if the bill allege that the parties omitted in the record of the action were out of the jurisdiction when the action was brought.[6]

When suit may be maintained against partners.

SEC. 797. A bill may be sustained *against* partners in respect of mutual unsettled accounts between them and any particular creditor, or to enforce the execution of a trust deed entered into between them and their creditors generally, or any particular class of creditors, or

---

in which there is some ground for coming into equity, other than the difficulty arising from the legal rules relating to parties to actions. In Cullen v. The Duke of Queensbury, 1 Bro. C. C. 101; affirmed in 1 Bro. P. C. 396, and in Horsley v. Bell, 1 Bro. C. C. 101, and 2 Amb. 770 (Query if this case can be considered law at the present day), suits were instituted against some of a number of persons to obtain payment from them of money which the plaintiff might have recovered at law; but in the first of these cases, a decree was sought for the sale of a house and payment of a mortgage, and in the other discovery was required, so that in each case there was a legitimate ground for coming into equity. A company which is incorporated must sue and be sued, in equity as well as at law, by its corporate name. As to security for costs, see *ante*. A company which, without being incorporated, is empowered to sue and be sued by a public officer, is sufficiently represented by that officer in all suits between the company as a body on the one side, and a stranger on the other. See Pendlebury v. Walker, 4 Y. & C. Ex. 424; Meux v. Maltby, 2 Swanst. 277. But, as will be seen hereafter, a public officer does not represent one set of shareholders as against another set, for he is only the representative of the shareholders as a body. A change in a public officer, *pendente lite*, does not abate a suit instituted by or against him. See Butchart v. Dresser, 11 Jur. 196, L. C. But, if a suit is instituted by a public officer, and he dies or is removed, and no steps are taken by his successor to prosecute the suit, the bill may, after the lapse of the usual time, be dismissed with costs for want of prosecution. Burmester v. Von Stentz, 23 Beav. 32.

[1] Small v. Atwood, 1 You. 407. And see Chancey v. May, Prec. Ch. 592; Cockburn v. Thompson, 16 Ves. 321.

[2] Story on Equity Pleading, p. 180, *in notis*.

[3] Norris v. Kennedy, 11 Ves. 565.

[4] See Slater v. Wheeler, 9 Sim. 156; Scholefield v. Heafield, 7 id. 667.

[5] Scholefield v. Heafield, *supra*.

[6] Darthez v. Lee, 2 You. & Coll. 12.

for the specific performance of contracts entered into by the partners jointly, or to compel the partners to interplead in cases where they have delivered goods to a bailee, and subsequently dispute amongst themselves as to the ownership of those goods.[1] Other instances of suits in equity against partners will occur to the mind of the learned reader.

Where a bill is filed against partners for an account and payment in respect of mutual dealings and transactions with the plaintiff, it must appear upon the bill specifically that the dealings and transactions were mutual, for it is not sufficient to charge that fact generally.[2] And where the bill is brought against the members of successive partnerships, it must appear that the mutual dealings have been carried on through all the partnerships, otherwise the bill is demurrable.[3]

Where the bill is filed against partners to enforce the execution of a deed of trust, a few of the creditors will be permitted to sue on behalf of themselves and the other creditors named in the deed. Where both joint and separate creditors are parties to a composition deed, the bill may be filed either by the joint or the separate creditors, or some of both. In a case where A and B were partners, and a bill was filed by some separate creditors of B, on behalf of themselves and all other the joint and separate creditors of A and B, to carry the trusts of a creditors' deed into execution, it being objected that one at least of each class of creditors ought to have been brought before the court, Sir John Leach overruled the objection, observing that it was not necessary to make a joint creditor of A and B, or a separate creditor of A, a party to the suit, and that the plaintiff, being a separate creditor of B, was entitled to represent all who claimed under this deed, although they did not claim in the same order.[5]

In suits of this nature, the creditors who file the bill must allege that they do so on behalf of themselves and the other creditors. They must likewise allege that the other creditors are numerous, unless that fact appear by some other means on the face of the bill.[7]

Who should be made defendants.

SEC. 798. Where a bill is filed against partners, the general rule is that all the individual members of the firm should be made defend-

[1] On this last point, Pearson v. Carden, 2 Russ. & Myl. 606.
[2] Frietas v. Dos Santos, 1 You. & Jer. 574.
[3] Jones v. Maund, 3 You. & Coll. 347.
[4] Story's Eq. Pl., § 102; 2 Ves. Sr. 113; Newton v. Earl of Egremont, 4 Sim. 574.
[5] Weld v. Bonham, 2 Sim. & Stu. 91.
[6] Leigh v. Thomas, 2 Ves. 313; Boddy v. Kent, 1 Mer. 361.
[7] 2 Sim. & Stu. 93.

ants. So, also, in a suit against partners for specific performance of an agreement, they who were parties to the agreement must be made defendants, although some may have since parted with their interest in the subject-matter of the agreement. As where three partners agreed in writing to grant a lease of a house to A, and upon the dissolution of their partnership it was settled amongst them that the house should belong solely to F, one of the partners, and A agreed to become tenant to F alone, the bill for specific performance of the agreement was properly filed against all.[1]

But the rule as to joinder of parties will not be enforced in all cases. Thus, a person, claiming against a numerous partnership or club, may, if he be not a partner, file a bill against a few of the partners or members only,[2] but it should seem that the bill must allege that the defendants are sued as representing the whole body,[3] and perhaps also that the plaintiff is unable to discover who are the other partners.[4] This latter allegation, however, it is conceived, will be unnecessary where the society against which the bill is filed contracts by means of a committee.[5] And where one partner is resident abroad the bill may be filed against him who is resident here, the absence of the other partner being accounted for and proved.[6] And in such case the partner before the court will be liable to pay the whole of the joint demand.[7]

Where a person claims a derivative interest from one of several partners or co-adventurers, it is unnecessary to make him a party to a suit against the partners, as, for instance, a dredger of oysters who receives from the boat-owners wages proportioned to the number of oysters taken.[8]

When one of the partners becomes bankrupt or dies, his assignees,[9] executors, or trustees must be made defendants. It will not generally be necessary to make persons claiming under the executors or trustees parties to the suit, but it has been laid down that persons having specific charges on the trust property are in many cases necessary par-

[1] Van v. Corpe, 3 Myl. & K. 269.
[2] Baldwin v. Lawrence, 2 Sim. & Stu. 26; Meux v. Maltby, 2 Swanst. 277; Adair v. New River Company, 11 Ves. 429.
[3] Lanchester v. Thompson, 5 Madd. 12.
[4] Cullen v. Duke of Queensbury, 1 Bro. C. C. 101; Meux v. Maltby, *supra;* Fenn v. Craig, 3 You. & Coll. 216.
[5] Cousins v. Smith, 13 Ves. 544.
[6] Cowslad v. Celey, Pre. Ch. 83; Weymouth v. Boyer, 1 Ves. 416.
[7] Darwent v. Walton, 2 Atk. 510.
[8] Perrott v. Bryant, 2 You. & Coll. 61.
[9] But of course if an uncertificated bankrupt enter into partnership, the creditors of that partnership have no equity against his assignees. Everett v. Backhouse, 10 Ves. 94.

ties.[1] In the case of Baring v. Noble,[2] the trustees (who were likewise the executors), under the will of Devaynes, the assignees of the surviving partners of Devaynes, and the *cestui que trusts* under the will of Devaynes were made defendants.

In Wilkinson v. Henderson,[3] in which the suit was brought by a joint creditor on behalf of himself and all other joint creditors of a partnership, for satisfaction of their debts out of the deceased partner's assets, Sir John Leach held that the surviving partner was properly made a defendant, though no decree could be had against him, he being interested to contest the demand of the plaintiff; and this decision was followed by Mr. Baron Alderson in Thorpe v. Jackson,[4] which was not a case of trading partnership, but of joint contractors only.

Where the bill states the same case against all the partners, and one of them demurs for want of equity and his demurrer is allowed, it seems clear that the other partners may plead this matter in bar of the suit.[5]

In a suit by a creditor against the representatives of a deceased partner and the assignees of the surviving partner, proving fraud in those whom the defendants represent, the plaintiff will be allowed his costs, which will be apportioned between the estate of the deceased partner and that of the bankrupt.[6]

When separate creditors may bring suit for administration.

SEC. 799. Upon the death of a partner his separate creditor may institute a suit for the administration of that partner's assets without reference to the joint trade, and, consequently, without making the surviving partners parties to the suit. And where the testator has appointed no executor, and the next of kin of such partner are unable or refuse to act in the administration of his estate, his separate creditor may have recourse to a bill against the surviving partners for an account of the partnership dealings, and for payment of the debts of all the creditors, provided he offer by his bill to put himself in the situation and submit to the liabilities of the deceased partner.[7] The

[1] Mitf. 170; and see Oldaker v. Lavender, 6 Sim. 243.
[2] 1 Mer. 530.
[3] 1 Myl. & K. 589.
[4] 2 You. & Coll. 553; but see Slater v. Wheeler, 9 Sim. 156.
[5] Tarleton v. Hornby, 1 You. & Coll. 333; Attorney-General v. Cradock, 8 Sim. 466.
[6] Vulliamy v. Noble, 3 Mer. 621.
[7] Burroughs v. Elton, 11 Ves. 29. Lord Eldon, considering the great advantages under which the plaintiff stood as between himself and the defendant, at first hesitated whether he should not insist upon the plaintiff giving security to answer the result of the account, but finding no precedent of such a proceeding, he did not adopt this course.

plaintiff, however, under such circumstances, ought to procure from the Ecclesiastical Court a limited administration for the purpose of substantiating proceedings in chancery.[1]

But even where the deceased partner has appointed an executor, his separate creditor or residuary legatee may, in certain cases, make the surviving partners of the testator parties to a suit filed by such separate creditor or legatee, for the administration of the testator's assets. This may be done either where there has been collusion between the executor and the surviving partner, or where the surviving partner has in his hands specific assets of the testator, in which latter case the bill need not charge any collusion between the executor and surviving partner.[2] In Newland v. Champion,[3] Lord Hardwicke made an observation, from which it might be inferred that bills of this nature might be sustained in all cases, though collusion between the executor and surviving partner was neither charged nor proved; for he said that such bills were allowed, in order that the plaintiff "might have an account of the testator's personal estate entire." But, in a late case,[4] Lord Langdale, M. R., was disinclined to sanction this doctrine, and said that the case of Bowsher v. Watkins, which was supposed to establish that general proposition, had been, in some degree, misunderstood, and was determined very much on its special circumstances. Where, however, the surviving partner is himself one of the executors, it seems clear that, in a suit for the administration of his testator's assets, the partnership accounts may be taken, although no collusion be charged between him and his co-executor;[5] though it should appear that the masters will refuse to take such accounts, unless they are specially directed so to do by the decree or a supplemental bill, or unless a petition be filed, in order to supply such omission.[6]

Who must answer.

SEC. 800. Where a bill is filed against partners, all must answer the bill either jointly or separately; and, *à fortiori*, if they have commenced an action against the plaintiff in equity, all must answer a bill filed to restrain that action.[7] In one case,[8] even though one of the partners was abroad, the court refused to dissolve an injunction

[1] Cawthorne v. Chalie, 2 Sim. & Stu. 129.
[2] Gedye v. Traill, 1 Russ. & Myl. 281 n; Bowsher v. Watkins, id. 277; Cropper v. Knapman, 2 You. & Coll. 338; and see Seeley v. Boehm, *infra*.
[3] Ves. 106.
[4] Davies v. Davies, 2 Keen, 534.
[5] Cropper v. Knapman, *supra*.
[6] Id.; Wooley v. Gordon, 1 Taml. 11.
[7] Kilby v. Stanton, 2 You. & Jerv. 77.
[8] Prince v. Haydin, 3 You. & Jerv. 190.

till all the defendants had answered. The bill was filed against two partners for an account, and an injunction to restrain proceedings at law. The common injunction was obtained for want of answer. An answer having been put in, exceptions were taken, some of which were allowed. One of the partners, who was resident in England, then filed a further answer, admitting the facts stated in the bill on which the exceptions were founded; but the other partner, being abroad, did not put in a further answer. The defendant, who had filed a further answer, moved to dissolve the injunction, on the ground that he had admitted the facts covered by the exceptions; and that, even if his answer did not bind his partner, yet the plaintiff could not obtain from the other defendant more than the same admission of the facts charged by him, which, it was insisted, did not entitle him to an injunction. Alexander, C. B., refused the application, though he believed the merits to be with the defendants, thinking that, to adopt a contrary course, would be the means of letting in a very objectionable practice. Considerable doubt, however, has been thrown upon this case by the observations of Lord Abinger, C. B., in Bowles v. Orr.[1] And it is clear that in chancery, where some of the partners only have answered, they may move to dissolve an injunction obtained against them all; but, in that case, the plaintiff may read affidavits in opposition to the motion.[2] We may conclude this chapter by observing that, in a case where the bill was filed by an annuity creditor of G against his executrix, who lived in Scotland, her attorneys to collect the property in England, and the partners in a house of agency, who, it was alleged, had considerable funds of the testator in their hands, and the partners put in a joint and several answer, it was doubted by Sir Thomas Plumer whether one of the partners, who had ceased to act in the business, could be compelled to look into the partnership accounts, in order to state the result of them as to particular matters which the acting partner had transacted.[3] According to a late decision, a partner, resident in England, of a house carrying on business abroad, is not bound to set forth in his answer a schedule of books, etc., relating to and in the custody of the foreign house.[4]

[1] 1 You. and Coll. 475.
[2] Naylor v. Wellington, 8 Sim. 396.
[3] Seeley v. Boehm, 2 Madd. 176.
[4] Martineau v. Cox, 2 You. & Coll. 638.

CHAPTER XXXV.

OF PARTNERSHIPS IN MINES.

SEC. 801. Subject to rules of ordinary partnership.
SEC. 802. Rights of co-adventurers.
SEC. 803. Rights of mortgagees of shares.
SEC. 804. Shares in, assignable.
SEC. 805. Implied conditions of the relation.
SEC. 806. Person liable as partner in, by holding out, when.
SEC. 807. No implication as to power of directors or agents to draw bills.
SEC. 808. Provisions of codes and ordinances.

Subject to rules of ordinary partnership.

SEC. 801. Courts of equity have uniformly considered the working of a mine as a species of trade.[1] In those cases, therefore, where co-adventurers in a mine have applied to courts of equity for relief, they have been guided in their decisions by the rules which apply to ordinary partnerships. Thus Lord Hardwicke held that a bill would lie for an account of the profits of a colliery, although for an account of the rents and profits of real estate no bill could be maintained.[2] His Lordship was also of opinion, and that opinion has been acted upon by Lord Brougham,[3] that an account may be decreed of the profits of a mine, though no injunction lies to restrain the working of it, a doctrine which distinguishes the case of mines from that of timber and other cases connected with the realty, in which an injunction is inseparable from an account. So it has been determined that the sale of a colliery is not like the sale of a landed estate, and that a purchaser, under the decree of a court of equity, is not entitled to call for an account of the profits of a colliery from any particular quarter-day, as upon the sale of a landed estate he is entitled to do.[4] So, also, it has been held that the rules which regulate the practice of opening

[1] Upon the subject of mines, see Mr. Sweet's edition of Jarman's Conveyancing, vol. 4, p. 663.

[2] Per Lord Eldon, Turn. & Russ. 73. See Story v. Lord Windsor, 2 Atk. 630 Bishop of Winchester v. Knight, 1 P. W. 406.

[3] Parrott v. Palmer, 3 Myl. & K. 632.

[4] Wren v. Kirton, 8 Ves. 502.

biddings upon a sale of landed estate, do not apply when a colliery is the subject of sale.[1] Moreover, a joint interest in iron mines and works has been held to be a partnership in trade, and a sale of the property has been decreed accordingly.[2] And, again, a receiver has been appointed of mines, in which several persons were interested, on the ground of the mining concern being a species of trade, and not a mere tenancy in common in land.[3] In short, to use the words of Lord Eldon, when persons, having purchased an interest of this nature, manufacture and bring to market the produce of the land, as one common fund, to be sold for their common benefit, it may fairly be contended that they have entered into an agreement, which gives to that interest the nature, and subjects it to the doctrines, of a partnership trade.[4]

Rights of co-adventurers, cases illustrating.

SEC. 802. The mutual rights of the co-adventurers must be the same as regards the trading, whether they have merely a license to work the mines, or whether they have taken an actual lease of the mines and surface lands.

But material distinctions exist between mining and other partnerships, both as regards the power of each adventurer to assign his share, and also the effect of the bankruptcy or death of any adventurer. The first of these distinctions is referred to by Lord Eldon in Jefferys v. Smith;[5] but both of them are expressly mentioned by Sir John Leach in the case of Fereday v. Wightwick.[6] There, six persons having taken a lease for years of certain mines, and also another lease of the surface lands under which the mines were situated, worked these mines and occupied the surface lands as a joint and partnership concern, dividing the same among them in certain shares. One of these six persons, Turton by name, assigned his shares, by way of security for money advanced, and then became bankrupt. He had been manager of the concern, and was greatly indebted to it at the time of his bankruptcy. The bill was filed by such of the original partners as continued to be in the concern, and by other persons, who either were the representatives of deceased original partners, or claimed as purchasers of shares. The prayer was that the partnership property might be sold, and the partnership accounts taken; and that it might be declared that the shares of the partner who

[1] Williams v. Attenborough, Turn. & Russ. 70.
[2] Crawshay v. Maule, 1 Swanst. 495.
[3] Jeffreys v. Smith, 1 Jac. & Walk. 298.
[4] 1 Swanst. 518.
[5] 1 Jac. & Walk. 301.
[6] Mich. T. 1829; S. C., Russ. & Myl. 45; Taml. 250.

had become bankrupt ought, in the first place, to be applied in repaying to the partnership the debt which he had incurred in the management of the concern. The principal question in this cause was, whether the plaintiffs were entitled to the relief last stated; the defendants, who claimed under the bankrupt partner, insisting that the common principles of partnership were not applicable to the case of mines, which were of the nature of real property. Sir John Leach: "In the year 1799 a lease was taken of certain mines, the lessees consisting of six persons; at the same time a lease was taken of the surface of the property. The mines and surface were used with a communion of expense and a communion of profit. The first question [1] is, whether this is a partnership property, liable to be sold and disposed of to pay the partnership debts, and whether a partner having sold part of his share, his interest is to be considered subject, in the first place, to repayment of what is due from him to the partnership. This question is concluded by authority, but I am willing to decide it upon principle. Mining concerns are, to some purposes, trading concerns, but they are not so to all; they are not so in this particular—namely, that they are not, as an ordinary partnership trade, subject to dissolution on the death or bankruptcy of any of the partners, and the shares are transferable without the consent of the other partners. In these particular instances they have not all the incidents of a trading concern; in other respects, it has been repeatedly held that they have. Now, it is a universal principle, in regard to all property, whether real or personal, acquired for the purposes of partnership, that property so acquired is, upon dissolution of the partnership, subject to sale and accounts between the partners, and to payment of the partnership debts. That is a universal principle. To apply the rule to this particular case, this property was acquired by these partners for the purposes of the partnership concern. Therefore, though in the nature of real property, it is subject to all the debts of the partnership, and subject to the debts of one partner incurred in the administration of that property. There can be no doubt, therefore, that the plaintiffs have a right to make this claim."

The right of a shareholder in a mine to assign his share, so as to constitute the assignee a partner with the other shareholders, does not seem to have been always recognized. Thus, in Jeffreys v.

[1] There was another point, see 1 Russ. & Myl. 50.

Smith,[1] Lord Lyndhurst seemed to admit the power of the remaining shareholders to refuse to accept the assignee as a partner; the express point, however, did not arise in that case. In a previous stage of the same cause,[2] the opinion of Lord Eldon was in favor of the right of the assignee. In a late case,[3] the express point came before Lord Abinger, and his Lordship held clearly that the *delectus personæ* has no place in mining partnerships; that a shareholder, therefore, may assign to whom he pleases, and that the assignee thereupon becomes partner with the other shareholders, that is to say, may call the other shareholders to an account; for, practically speaking, as the whole concern is generally intrusted to a manager, the right to an account is the leading privilege of a partner in a mine.

In the same case, Lord Abinger held it to be unnecessary for a mining partner, in praying for an account in equity, to pray for a dissolution, inasmuch as his power to assign is, as far as regards himself, a power of dissolution.

As to the effect of bankruptcy we may here remark, that although, if one of several miners become bankrupt, the partnership accounts may, in a court of equity, be taken as in the case of an ordinary partnership, yet, in a court of bankruptcy it is otherwise, because the accounts there taken of the partnership depend on the hypothesis that the partnership has been dissolved by the bankruptcy.[4]

Rights of mortgagees of mining shares.

SEC. 803. Another point which demands our attention is that of the rights of mortgagees of mining shares. It was strenuously argued in a late case[5] that whatever were the rights of absolute assignees of mining shares, mortgagees had no rights but those of mortgagees simply; and, consequently, that a mortgagee in possession of shares could not file a bill against the other shareholders for an account. Lord Abinger, however, held that, as regarded all other persons but the mortgagor, the mortgagee stood in the same position as any absolute assignee of shares, and, consequently, that he could maintain such a bill. It may be remarked, also, that in the case of Rowe v. Wood,[6] Lord Eldon seemed clearly to recognize the right of a mortgagee in possession to become partner, subject to the question in what manner the accounts were to be taken between him and the mortgagor, and subject to the rights of the mortgagor, as partner as well as mortgagor.

[1] 3 Russ. 169.
[2] 1 Jac. & Walk. 301.
[3] Bentley v. Bates, 4 Jur. 552.
[4] Ex parte Broadbent, 1 Mont. & A. 635.
[5] Bentley v. Bates, *supra*.
[6] 2 Jac. & Walk. 559.

The substance of the doctrine to be gathered from the last-mentioned case is this: that a mortgagee in possession of mines is not bound to spend more upon them than a prudent owner, but that, if he become partner, the management must be considered with reference to the benefit of the other partner, as well as to the rights of the mortgagor and mortgagee, and that the mortgagee, though his mortgage be unsatisfied, cannot wholly exclude his partner from interference in the partnership. That, although on the one hand a court of equity will not deprive the mortgagee of his possession by appointing a receiver, unless it be clearly shown, and that almost by his own admission, that he has been fully paid, yet, on the other hand, the mortgagor, subject to the equities which may ultimately be declared between the parties, has a clear right to insist that regular accounts shall be kept of all receipts, payments, and transactions relative to the mine and to have constant access for the purpose of inspecting the accounts; that, subject also to those equities, he has a clear right to control the working of the mines; and that, if he is impeded in the exercise of any of these rights he may receive relief in a court of equity.

Shares in, assignable.

SEC. 804. As the shares in a mining partnership are assigable at the will of the owner, it follows that a court of equity will entertain suits for the specific performance of an agreement to purchase or to sell such shares. It has been held that a purchaser of a share in a mining business does not waive objections to the title by taking possession of the property and acting as a partner, when a contract stipulates that a good title shall be made by a specified day, and it appears to have been the intention of the parties that the purchaser should immediately, and before that day, have the possession.[1] And where, upon the bill of a vendor against the purchaser, charging gross mismanagement, specific performance of a purchase of a share in mines is refused for want of a good title, the court, upon a record so framed, will refuse to direct accounts or inquiries as to the defendant's possession or management of the property, with a view to ascertain whether any and what sum ought to be paid, and compensation made, by him to the plaintiff.[2]

Implied conditions of the relation.

SEC. 805. The mutual rights and duties of mining adventurers

[1] Stevens v. Guppy, 3 Russ. 171. [2] Id.

must be determined by the general rules of partnership. And, although the shares of each are separate and some possess a greater number of shares than others, yet a contract is implied between them that the concern is to be carried on in a practicable and feasible way. Therefore, all ought to work jointly and equally, or they ought to appoint a manager to conduct the business for them. Lord Eldon, referring to the collieries in the north, observed: "In my country, where there are frequently twenty owners of the same mine, if each is to have a set of miners going down the shaft to work his twentieth part, it would be impossible to continue working the mine.[1]

However, if the part-owners of a mine cannot agree to appoint a manager, a court of equity will manage it for them. And, generally, where disputes arise between the miners, of such a nature as to require judicial interference, a court of equity, as we have before mentioned, will apply the same remedies as are usually adopted in partnership matters. Therefore, if need be, it will decree a dissolution, an account, and a receiver.[2]

Nor will the equities subsisting between the miners themselves be affected by the circumstance that some of them have not a good title to their shares. Thus, in the case of Jefferys v. Smith,[3] A being, as a partner, entitled to a share of extensive iron works, and of the lands and premises on which they were carried on, agreed for valuable consideration to assign to B his interest in the property and business; B interfered and acted as a partner; but afterward he assigned his share, and gave notice to the other partners, that he had withdrawn from the business; and, when called on to complete his purchase, resisted the performance of the contract successfully, on the ground that a good title could not be shown. It was held that B, as between him and the other partners, was to be treated as a partner, and was

[1] 1 Jac. & Walk. 302. On this subject, so far as it affects the mining laws of Spain and her colonies, see Vol. 1, p. 187, of the Commentaries of Gamboa, as translated by Richard Heathfield, Esq., of Lincoln's Inn. "In deep mine," says the learned jurist, "admitting of a variety of works, we have occasionally met with instances where the partners have agreed to work the mines by regions, so that one should work in one direction and the other in another; or, where they have taken it in turn to work upon the vein at alternate periods of time. Neither of these plans is free from inconvenience: the first being inconvenient from the thefts and disputes of the workmen and laborers, and the second from the parties being apt to work out the vein and cut away the pillars of support in order to make the most of their time, yet they serve to quiet disputes between the owners, and the latter plan, that of working alternately, is a correct and legal one, as may be seen by the text of Ulpian (Dig. lib. 23), for, as the result is uncertain, and the chances of each part are equal, there can be no objection to its justice or legality.

[2] Jefferys v. Smith, 1 Jac. & Walk. 298.

[3] 3 Russ. 158.

to contribute to the partnership losses, until the time when he gave notice of his withdrawal from the concern, and assigned his share.

It ought to be noticed, that in the case of Senhouse v. Christian,[1] Lord Loughborough advanced a doctrine of great importance, respecting the equities of miners. He held, that if a person, not having the legal interest in a mine, permit another to incur great risk and expense in working it, without giving such other person notice of his claim, he shall not afterward be permitted to come into a court of equity for the purpose of substantiating such claim.

Person liable as partner in, when holds himself out as such.

SEC. 806. A person will be chargeable as a partner in a mining company, either on the ground of being an actual partner, or of having held himself out to the world as such. But, to prove a person an actual partner in a mine, there must be some evidence that an actual interest has been conveyed to him, unless the co-adventurers work the mine by virtue of a license only. In Vice v. Lady Anson,[2] an action was brought against the defendant, as one of the adventurers in a mining company, to recover the price of goods sold, and work and materials furnished by the plaintiff for the working of the mine. The plaintiff, when he furnished the goods, had no knowledge of Lady Anson as a shareholder. It appeared, however, that she had spoken and written of herself in society and private letters, as being one; but she never signed any deed. She paid her deposits on her shares, and received certificates, stating that she was a proprietor of certain shares, and that her name was duly registered in the act-book of the mine. Upon this evidence, Lord Tenterden directed the jury, that, as the plaintiff did not give credit to Lady Anson, and as she had never held herself out to the world as a partner, she must be chargeable, if at all, on the ground of being really interested. Was there then any evidence from which it might be inferred that Lady Anson ever had any interest in the mines conveyed to her? He thought not. The partnership, if any, was not strictly a trading partnership; it was one formed for the purpose of working a mine, a species of real estate. An interest in real estate could only pass by certain formalities; and it was clear that the certificates were not sufficient to pass it, nor would the registration in the act-book of the company be sufficient. It did not appear that Lady Anson had derived any interest in the mines from any other person; and the

[1] 19 Ves. 159, cited.

[2] 7 Barn. & Cres. 409; 1 Man. & Ryl. 113; 1 Mood. & Malk. 43; 3 Car. & P. 19.

certificates, which clearly did not in themselves pass any interest, furnished no evidence that an interest had passed. Under these circumstances, he thought that it was not satisfactorily made out that Lady Anson had any interest in the mine. After this charge, the plaintiff's counsel elected to be nonsuited, and the Court of King's Bench refused to set the nonsuit aside.

From this case it should seem, that, in order to charge a person as an actual partner in a mine, the deed of assignment of the shares must be proved. On the other hand, it has been inferred from the words of Lord Tenterden, that it would be sufficient, in an action of this nature, to give some evidence, from which the jury would be warranted in concluding that such a deed had been executed by the defendant.[1]

Where the shares of a mining company stand in the name of a person who executes the deed of association, and holds the shares as trustee for another, then, if the latter becomes bankrupt, his assignees have only an equitable right against the trustee to compel an assignment of the shares, and, consequently, cannot maintain an action of trover for them.[2]

No implication as to power of directors or agents to draw bills.

SEC. 807. In the case of an ordinary trading partnership, the law implies that one partner has authority to bind another by drawing and accepting bills, because the drawing and accepting of bills is necessary for the purpose of carrying on a trading partnership. But, as this power is not generally necessary for the purpose of carrying on the business of a mining company, the law will imply no authority in the directors of a company to bind the shareholders by bills of exchange.[3] And, *a fortiori*, the agent of a mining company has no implied authority to bind the shareholders by bills drawn or accepted by him in the name of the company.[4]

Provisions of codes and ordinances.

SEC. 808. By several statutes in different Spanish Codes, and particularly by the Ordinances, chap. 7, sec. 1, foreigners are prohibited from acquiring or working and supplying mines. These disabling laws were repealed to a certain extent by a law of the Sovereign Congress of Mexico in 1823. But it seems clear from the argument of a

[1] Lloyd & Welsby, 19.
[2] Dawson v. Rishworth, 1 Barn. & Adolph. 574.
[3] Dickinson v. Valpy, 10 Barn. & Cres. 128; Lloyd & Welsby, 6.
[4] Ducarry v. Gill, 1 Mood. & Malk. 450; 4 Car. & Payne, 120.

learned writer,[1] that the repeal of these disabilities does not extend to give foreigners a right of acquiring any absolute property in the Mexican mines. They stand, therefore, with respect to the native mine owner in the situation of mine suppliers, or persons supplying capital for carrying on the mine, and taking a share of the metals as a remuneration. The 15th chapter of the Ordinances just referred to, contains a great variety of provisions for the regulation of the contracts between mine owners and mine suppliers. Notwithstanding, however, these specific provisions, it seems clear that the general laws of partnership must sometimes be resorted to in order to adjust all differences between the parties. The laws which regulate mining partnerships are contained in the 11th chapter of the same Code.[2]

Since the repeal of the disabling laws before mentioned, the Anglo-Mexican and other English companies have been established for the purpose of working the American mines.

[1] Thomson on the Ordinances of the Mines of New Spain, p. 29, *et seq.* The learned writer, however, admits that there are persons of great intelligence and experience in the mines of Mexico, who think that they have a right of acquiring such absolute property. The author is informed that where foreign adventurers intend to enjoy the absolute interest, it is frequently the custom to take the mines in the name of a native as trustee for such adventurers.

[2] This code of laws was framed in the reign of Charles the Third, and during the ministry of Joseph de Galvez, in the year 1783. Mr. Heathfield remarks that in the regulations which concern the working of the mines, this code very closely follows the former ordinances, but that where alterations are made, they are not unfrequently adopted from the suggestions of Senor Gamboa. See Heathfield's preface to the Commentaries of Gamboa, p. 3.

CHAPTER XXXVI.

OF PART OWNERS OF SHIPS.

SEC. 809. Of the interest of part owners.
SEC. 810. Of the ship's register.
SEC. 811. What may be registered.
SEC. 812. As to the declaration.
SEC. 813. Contents of certificate.
SEC. 814. Of the ship's transfer.
SEC. 815. Of the material rights of part owners.
SEC. 816. Rights of majority.
SEC. 817. Ship's husband, duties of.
SEC. 818. Duty of part owners as to expenses.
SEC. 819. Rights of, between themselves.
SEC. 820. Relative rights of part owners and third persons.
SEC. 821. Power of agents and part owners as to repairs.
SEC. 822. Distinction between part owners and partners.
SEC. 823. Of actions and suits against partners.
SEC. 824. Who should be sued.

Of the interest of part owners.

SEC. 809. A ship is a chattel of which the owners are possessed as tenants in common, though if it be conveyed to them at one time, and by one instrument, they are more properly joint tenants, without benefit of survivorship.[1]

It is the primary business of the owners to let the ship out to freight, freight being the consideration-money agreed to be paid for the use or hire of a ship, or, in a larger sense, for the burthen of such ship.[2] However, it frequently happens that the part owners

[1] It is said, however, by a learned writer, that if the entire ship is granted to a number of persons generally, they become joint tenants at law, and that the rule *jus accrescendi inter mercatores locum non habet*, which is applicable to a ship, is to be enforced only in a court of equity. See Abbott on Shipping, 59. No grounds, however, are given for this opinion. See D. Scarlett, *arguendo*, Rex v. Collector of Customs at Liverpool, 2 Mau. & Sel. 223. — N. B. The note stood thus in the first edition of this work. The author has since been happy to find that the doubt which is implied from the above observations, as to the accuracy of the statement in Abbott, is likewise entertained by Mr. Justice Story. See that learned judge's edition of Abbott, p. 68 n.

[2] Beawes, 34; Monteflore, "Freight."

work their own ship for the purposes of their own traffic, and, in such case, they are to be considered as part owners in the adventure, though part owners of the ship.

We have seen that partners have a specific lien on the partnership stock, in respect of the balance due to them on the partnership account.[1] In Doddington v. Hallet,[2] Lord Hardwicke extended his

[1] Ship-owners are tenants in common in the ship itself, but, when the vessel is fitted out at joint expense and sent out upon a trading voyage, they are partners in the proceeds. Mumford v. Nicoll, 20 Johns. (N. Y.) 631; Allen v. Hawley, 6 Fla. 142; Julio v. Ingalls, 1 Allen (Mass.), 42; Jones v. Scott, 2 Ala. 58; Williams v. Lawrence, 53 Barb. (N. Y.) 324; Claiborne v. Creditors, 13 La. 281; David v. Eloi, 4 id. 109; Post v. Kimberly, 9 Johns. (N. Y.) 488; Bryne v. Hooper, 2 Rob. (La.) 233; Donald v. Hewitt, 33 Ala. 551; Baxter v. Rodman, 3 Pick. (Mass.) 438. In Louisiana the owners of vessels carrying freight and passengers are held to be commercial partners, and subject to the same liabilities and entitled to the same liens and remedies, Claiborne v. Creditors, *ante*; and the same is held in New York, Williams v. Lawrence, 53 Barb. (N. Y.) 324, as to the proceeds of the earnings of the vessel. If one owner makes advances on account of the vessel he has a lien upon it to the extent of such advances. Nugent v. Locke, 4 Cal. 318; Hewitt v. Sturdevant, 4 B. Monr. (Ky.) 453. In Strelly v. Winsom, 1 Vern. 297, two out of three of the part owners of a ship without the consent of the third and against his wishes, employed the ship on a voyage. The ship was lost on the voyage and it was held that the loss must be borne equally by all the owners. The status of the owners seems to be that, as to the ship, the owners are tenants in common, but when the ship is employed for their joint benefit, as to that, they are partners. Reeves v. Goff, 1 Penn. St. 454; Merritt v. Walsh, 32 N. Y. 685; Donnell v. Walsh, 33 id. 43. Consequently when a vessel is employed by the owners in the carriage of freight or passengers, they are liable as partners for any loss resulting therefrom to a third person. Thus, in Heirn v. McCaughran, 32 Miss. 19, the defendants were owners of a steamboat line running between New Orleans and Mobile, for the conveyance of passengers and freight. The boats were in the habit of stopping at certain places, including Pascagoular, during the summer season, and during the winter at certain other places, and, when deemed advisable, they were in the habit of giving special notice at Pascagoular and other places, of the intended stopping of the boat at such places. On December 20 a letter was written by Abrams, the confidential clerk in New Orleans, and delivered by one of the company's boats to the postmaster at Pascagoular, on the 21st, with a desire that he should make known that the mail boat for Mobile would stop at Pascagoular, December 24th. Notice was accordingly posted up by the postmaster, and the plaintiff and his wife, relying upon such notice, had gone to the pier head at 9 o'clock at night, and waited there in severe cold weather for the boat all night. The boat passed, however, without calling at Pascagoula. The plaintiffs claimed they had a right to recover for this neglect of duty by common carriers, not only actual but exemplary damages; that the owners of the boat were partners, and responsible to passengers as such; that the action was based and sustainable on the common-law liability of common carriers for a breach of a general duty, in not complying with their engagements to the public, and not upon any special contract with the plaintiffs; that, if the injury arose from the tort or negligence of one of the partners in carrying out the partnership business, all were civilly liable; that, after giving such special notice in Pascagoular, by direction of one of the partners in New Orleans, the plaintiffs and the public had a right to rely upon it, and to recover exemplary damages for the breach of duty in not stopping at Pascagoular, according to the notice given. See also Green v. Briggs, 6 Hare, 403; Leslie v. Wilson, 6 Moore, 429. When the owners of a vessel are in fact partners, one cannot, in the absence of an express contract therefor, charge for services in sailing it. Thus, in Miller v. Mackay, 31 Beav. 78, two persons

[2] 1 Ves. 407.

doctrine to part owners of ships, holding, in a case where one of several part owners died without paying his portion of the expense of building and fitting out a ship, that the other part owners had a specific lien on his share for the moneys which they had laid out on this account. But Lord Eldon, after great consideration, overruled this decision of Lord Hardwicke, being of opinion that part owners of a ship, being tenants in common and not joint tenants, have not, by analogy to partners, a lien on the shares of each other.[1] In one of the two cases before Lord Eldon, the managing owners being indebted to the other owners, on balance of accounts, for the freight and earnings of the ship, became bankrupts, and their assignees sold their shares. The other owners petitioned that the sum due to them might be paid out of the proceeds of the sale, but Lord Eldon dismissed the petition.

But where part owners join in the particular adventure on which the ship is sent, they are, as we have already observed, partners in the adventure, and are entitled, as amongst themselves, to all the privileges of partnership. Although, therefore, they have no lien on the ship, they will have a lien on the other goods of the adventure, in respect of the balance due to them for the whole transaction, including the expenses of the ship. This doctrine was fully confirmed in a modern case of great importance.[2] The bankrupt, Foxton, jointly with one Locking and the defendant, and some other persons, was part owner of the ship Jane, a vessel belonging to Hull, engaged in a whale fishery. Locking was the ship's husband. The usual mode of managing the cargo was as follows: On the arrival of the vessel at Hull from the fishery, the whalebone was taken into the possession of Locking, and sold by him for the part-discharge of the expenses of the ship. The blubber was landed and deposited in a yard belonging

owned a ship as partners, and one, who acted as ship's husband, claimed to be allowed a commission. The court held that "when two or three persons or firms are interested in a ship, *prima facie* the whole profits of that ship would have to be divided between them; and each of them would be equally entitled to act as ship's husband, and to have the profits of that office; but if one acts as ship's husband, without any consent, either express or implied, of the others, it seems difficult to say that he is entitled to have, as against his partners, the whole amount of the ordinary rate of commission for acting as ship's husband." A reference was ordered to ascertain how the partners had acted, and whether any agreement existed on the subject. When repairs are made on a ship, elsewhere than in the home port, all are liable therefor. Scattin v. Stanley, 1 Dall. (U. S.) 129. One joint owner in a vessel may mortgage it for the purpose of paying firm debts. Patch v. Wheatland, 8 Allen (Mass.), 102; Lamb. v. Durant, 12 Mass. 53.

[1] Ex parte Young, 2 Ves. & Bea. 242; Ex parte Harrison, 2 Rose, 76.

[2] Holderness v. Shackels, 8 Barn. & Cres. 612; 3 Man. & Ryl. 95; overruling in this respect, Smith v. De Sylva.

to the defendant, in which were several warehouses, each of which was appropriated to a particular ship. One of these was rented from the defendant by the owners of the ship Jane, and appropriated exclusively to that ship. The blubber was boiled in a boiling-house in the yard by one Gilchrist, the defendant's foreman, and for this a certain price per ton was charged by the defendant. The blubber, being then reduced into the shape of oil, was put into casks; each part owner's share was then weighed out, and placed separately in the warehouse rented by the owners of the ship. Gilchrist kept the keys of the warehouse, and lived in the yard. After each division, the practice was for him to deliver to the separate orders of each owner the oil belonging to them, unless, previously to the delivery, he received a notification from the ship's husband that the part owner's share of the disbursements had not been paid to him. In that case he used to detain the oil till the ship's husband's demand had been satisfied. In June, 1825, the ship Jane arrived with a cargo, and the above, being the usual course, was followed on that occasion. Foxton's share was weighed and set apart for him, and about nine tons of it remained in the ship's warehouse at the time of his bankruptcy. In January, 1826, Gilchrist had orders from Locking, as the ship's husband, not to deliver to Foxton the remaining oil, as his share of the disbursements of the ship was not paid. In the same month Foxton became a bankrupt, and there remained due from him at the time of his bankruptcy, in respect to his share of the ship, the sum of 564*l.* 12*s.* The plaintiffs, as assignees of Foxton, formally demanded possession of the nine tons of oil from the defendant, offering to pay to him a sum which exceeded what he demanded in respect of rent, and charges for boiling the blubber. The defendant, however, absolutely refused to receive the moneys, or give up the oil; and, accordingly, the plaintiffs brought their action of trover against him; but the Court of King's Bench gave judgment for the defendant. Lord Tenterden said, this was not the case of a claim of lien on the share of the ship, but a claim by persons, being part owners of a ship, engaged together in an adventure, and the subject-matter, in respect to which this action was brought, was part of the proceeds of that adventure, viz.: part of the oil which had been obtained on a fishing voyage. That it was clearly established as a general principle of law, that, if one partner becomes a bankrupt, his assignees can obtain no share of the partnership effects until they first satisfy all that is due from him to the partnership. Supposing that the partners had in

this case a lien originally, had any thing happened to take it away? If the account were taken as between Foxton and Locking generally, there could be no question that the bankrupt was indebted to the other part owners, for they were ultimately obliged to pay the expense which had been incurred before the bankruptcy.

Owners are not bound to continue their paction or partnership longer than they please;[1] and, accordingly, it will be seen at a future page that one part owner may sell his share without the privity of the others. We will here, however, advert to an observation made by Molloy:[2] "If," he says, "a ship be broken up, or taken in pieces, with an intent to convert the same to other uses, and, afterward, on change of mind, she be rebuilt with the same materials, she is now another and not the same ship, especially if the keel be ript up or changed, and the whole ship be all at once taken asunder and rebuilt; there determines the partnership, *quoad* the ship. But if a ship be ripped up in parts, and taken asunder in parts, and repaired in parts, yet she remains still the same vessel, and not another; nay, though she has been so often repaired that there remains not one stick of the original fabric."

Of the ship's registry.

SEC. 810. It has been the policy of the British Legislature[3] to confine the privileges of our trade to ships built within the King's dominions. The various commercial privileges of British ships are stated in the statutes 6 Geo. 4, c. 109, and the 7 Geo. 4, c. 48, consolidated by the stat. 3 & 4 Will. 4, c. 54, the present navigation act. By this statute it is enacted that the several sorts of goods therein enumerated, being the produce of Europe, shall not be imported into the United Kingdom, to be used therein, except in British ships, or in ships of the country of which the goods are the produce, or in ships of the country from which the goods are imported.

It is evident, that in order to enforce these enactments, it should be clearly understood what is, strictly and legally speaking, a British ship. Accordingly, by the 12th section of the Navigation Act, no ship shall be admitted to be a British ship, unless duly registered and navigated as such, and by the 3 & 4 Will. 4, c. 55, the Registry Act, no ship or vessel shall be entitled to any of the privileges or advantages of a British registered ship, until the person or persons claiming

[1] Molloy, de Jur. Mar. 222.
[2] De Jur. Mar. 224.
[3] On the general policy of the Navigation Laws, see Mr. Huskinson's speech, May 1826.

property therein shall have caused the same to be registered in virtue of the previous Registry Acts (the 6 Geo. 4, c. 110, and 4 Geo. 4, c. 41), or in manner thereinafter mentioned, and shall have obtained a certificate of such registry from the person or persons authorized to make such registry, and grant such certificate, as thereinafter directed.

Amongst the matters most worthy of consideration in the last-mentioned enactment, we shall direct our attention to the two following:—1. The circumstances and mode of registry; 2. The form of certificate.

What may be registered.

SEC. 811. Under the first head, the leading regulations are, that no ship shall be registered, except such as are wholly of the build of the United Kingdom, or of the Isle of Man, or of Guernsey, Jersey, or the colonies, or such as shall have been condemned in any Court of Admiralty as prize of war, or in any competent court, for breach of the laws regulating the slave trade; that the owners must be subjects of Great Britain, and not more than thirty-two in number; that the registry be made in the United Kingdom, by the collector and comptroller of the customs in any port; that ships shall be registered at the port to which they belong, and that they shall be deemed to belong to some port, at or near which some or one of the owners, who shall make and subscribe the declaration required by this act, shall reside; that at every port where registers shall be made a book shall be kept, which shall contain the particulars of the certificate; and lastly, that the owners, previous to registry, shall make and subscribe the declaration set forth in the act. Of these regulations we shall consider somewhat more at length those which relate to the number of owners, and the declaration to be taken by them.

As to the number of the owners: By the 33d section of the act it is enacted that no greater number than thirty-two persons shall be entitled to be legal owners at one and the same time, of any ship, as tenants in common, or be registered as such.

It is provided by the same section that nothing therein contained shall affect the equitable title of minors, heirs, legatees, creditors, or others exceeding that number, duly represented by or holding from any of the persons within the said number, registered as legal owners of any share or shares of such ship.

It is further provided by the same section that if it shall be proved to the satisfaction of the Commissioners of his Majesty's Customs, that any number of persons have associated themselves as a joint

stock company, for the purpose of owning any ship, or any number of ships, as the joint property of such company, and that such company have duly elected or appointed any number, not less than three of the members of the same, to be trustees of the property in such ship or ships so owned by such company, it shall be lawful for such trustees, or any three of them, with the permission of such Commissioners, to make and subscribe the declaration required by this act before the registry be made, except that, instead of stating therein the names and descriptions of the other owners, they shall state the name and description of the company to which such ship or ships shall in such manner belong.

By the 32d section it is enacted that the property in every ship, of which there are more than one owner, shall be taken and considered to be divided into sixty-four parts or shares, and the proportion held by each owner shall be described in the registry as being a certain number of sixty-fourth parts or shares, and that no person shall be entitled to be registered as an owner of any ship, in respect of any proportion of such ship, which shall not be an integral sixty-fourth part or share of the same.

It is provided by the same section that, if it shall at any time happen that the property of any owner or owners in any ship cannot be reduced by division into any number of integral sixty-fourth parts or shares, it shall be lawful for the owner or owners of such fractional parts as shall be over and above such number of integral sixty-fourth parts or shares, into which such property in any ship can be reduced by division, to transfer the same one to another, or jointly to any new owner, by memorandum upon their respective bills of sale or by fresh bill of sale, without such transfer being liable to any stamp duty, provided that the right of such owner or owners to such fractional parts shall not be affected by reason of the same not having been registered.

It is further provided by the same section that it shall be lawful for any number of owners named in such registry, being partners, to hold any ship, or any share of any ship, in the name of such copartnership, as joint owners thereof, without distinguishing the proportionate interest of each of such owners, and that such ship, or the share or shares thereof so held in copartnership, shall be deemed and taken to be partnership property to all intents and purposes, and shall be governed by the same rules, both in law and equity, as relate to and govern all other partnership property in any other goods, chattels, and effects whatsoever.

Upon the construction of this section it has been held that although the respective shares in the ship to which the partners are individually entitled need not be defined, yet, in order to maintain the interest of each partner against third persons, the names of all the partners must appear on the register, although the name of the partnership firm may also be added. On these grounds Lord Langdale decided the case of Slater v. Willis.[1] There, the ship had been registered in the name of the partnership firm of A & B, in which C was a dormant partner. A and B sold and assigned the ship to certain persons, who, as it should seem, had no notice of C's partnership. C afterward becoming bankrupt, his assignees filed a bill against the vendees of the ship, praying a declaration that the assignment by A and B passed only what might be their interest in the ship (exclusive of that of C), after taking the partnership accounts; but Lord Langdale was of opinion that the plaintiffs had no equitable title and dismissed the bill.

And it should seem that even as between the partners themselves, the one whose name is not registered will not be allowed to claim an equitable interest against the other, who is possessed of the legal title by registry in his name. In Curtis v. Perry,[2] Lord Eldon, after saying that he would give no opinion on the effect of the registry acts on trusts implied by law, observed that if the question before him was to be considered as one between the two partners, it was perfectly clear that the partner whose name was not registered could not be heard to say that he had any interest in the ships. And in Battersby v. Smith,[3] where three persons had agreed to purchase a ship, and that it should be registered in the name of two only, and the other filed a bill for an account of the profits, a general demurrer was allowed, the agreement being held illegal. So, likewise, in another case, the Court of Admiralty refused to give possession of a ship's register to a person whose legal title was doubtful; Lord Stowell observing that he took the general rule to be that the register and certificate are conclusive evidence of want of title as against those not named therein.[4]

Where, however, the title to the freight and the title to the ship are separate, it seems clear that the contracts as to freight, both as against third persons and as between the partners themselves, will not be invalidated in equity by a breach of the laws of registration.

[1] 1 Beav. 354.
[2] 6 Ves. 739. *Sed qu.*
[3] 4 Madd. 110. See Thompson v. Leake, 1 id. 39.
[4] The Frances, 2 Dods. 423.

Even where the ship and freight are comprised in one bill of sale, it has been thought that courts of equity would sever the two parts of the transaction and hold the contract good as to the freight, though invalid as to the ship.[1] But whatever might be the decision of a court of equity under such circumstances, it has lately been held by Lord Cottenham, in the case of Davenport v. Whitmore,[2] that where the title to the ship and the title to the freight are expressly severed by the contract of the parties, there an account may be decreed as to the freight in favor of a person, who, for want of proper registration, may have no legal interest in the ship itself. In the case before Lord Cottenham, A being indebted to certain ship owners, it was agreed between the parties that he should work the ship and pay his debt out of the freight, and that, as a further remuneration for his services, he should, upon payment of the debt, be entitled to an interest in the ship. Lord Cottenham held that a bill for an account of the freight was clearly sustainable by A against the owners, although A might not be able to set up a claim to the ship which was not registered in his name. In this, the bill charged that the defendant had given the plaintiff credit on account for the freight, though the account delivered was erroneous. "If a ship," said his Lordship, "be registered in the name of one, and he, admitting the ship to be the property of himself and another, places the freight to the joint account and settles the account upon that footing, can he, at a future time, withdraw all such items from the joint account, because at law he alone can be recognized as owner of the ship?" And his Lordship distinguished this case from that of Battersby v. Smith, by observing that in the latter case there was no allegation of any contract as to the freight, or that the amount of it had been placed to the plaintiff's account by the defendant; the title to the account of the freight was made to depend upon and to grow out of the plaintiff's alleged title of part owner.

The rights of third persons as against persons really interested in a ship cannot, it is conceived, be affected by the Registry Acts.

As to the declaration.

SEC. 812. Next as to the declaration: By the 13th section it is enacted that no registry shall thenceforth be made, or certificate granted, until the following declaration be made and subscribed before

[1] Mestaer v. Gillespie, 11 Ves. 261.

[2] 2 Myl. & C. 177. And see Douglas v. Russell, 4 Sim. 524.

the person or persons thereinbefore authorized to make such registry, and grant such certificate respectively by the owner of such ship, if such ship is owned by or belongs to one person only; or, in case there shall be two joint owners, then by both of such joint owners, if both shall be resident within twenty miles of the port or place where such register is required, or by one of such owners, if one or both of them shall be resident at a greater distance from such port or place; or, if the number of such owners or proprietors shall exceed two, then by the greater part of the number of such owners or proprietors, if the greater number of them shall be resident within twenty miles of such port or place as aforesaid, not in any case exceeding three of such owners or proprietors, unless a greater number shall be desirous to join in making and subscribing the said declaration, or by one of such owners, if all, or all except one shall be resident at a greater distance.

The declaration is then set forth containing the name of the ship, her port and master, the description of the ship, the name, occupation, and residence of every part owner, with other particulars tending to prove them subjects of Great Britain, and concludes with a positive averment that no foreigner, directly or indirectly, hath any share or interest in the ship.

By the same section, if the ship belong to a corporate body, the oath is to be made by the secretary or other proper officer of such body, and instead of the names and descriptions of the owners, he is to state the name and description of the company or corporation to which the ship belongs.

By the 14th section it is enacted that in case the required number of joint owners or proprietors of any ship shall not personally attend to make and subscribe the declaration thereinbefore directed to be taken and subscribed, then, and in such case, such owner or owners, proprietor or proprietors, as shall personally attend and make and subscribe the declaration aforesaid, shall further declare that the part owner or part owners of such ship then absent is or are not resident within twenty miles of such port or place, and hath or have not, to the best of his or their knowledge or belief, willfully absented himself or themselves in order to avoid the making the declaration thereinbefore directed to be made and subscribed, or is or are prevented by illness from attending to make and subscribe the said declaration.

By the 32d section it is enacted that upon the first registry of any

[1] Abbott, 41.

ship the owner or owners, who shall make and subscribe the declaration required by this act before registry be made, shall also declare the number of such parts or shares then held by each owner, and the same shall be so registered accordingly.

At the time of obtaining the certificate a bond must be executed by the Master and such of the owners as personally attend, to be approved of and taken by the person authorized to make the registry, in a penalty varying in proportion to the burthen of the ship, but never exceeding 1,000*l.*, but if the Master cannot attend at the time of the registry by reason of the absence of himself and the ship at some other port, a separate bond may be given by him at the port where the ship may then be, which shall be transmitted to the port where the ship is to be registered, and the two bonds shall be of the same effect as if the parties had bound themselves jointly and severally in one bond; and every such bond is to be as a security that the certificate shall not be lent, sold, or disposed of, but solely used for the service of the ship for which it is granted; and in case the ship be lost, captured, or destroyed, or otherwise prevented from returning to the port to which she belongs, or shall have forfeited the privileges of a British ship, or have been condemned for illicit trading, or have been taken in execution for debt and sold accordingly, or sold to the crown or have been registered *de novo*, the certificate, if preserved, shall be delivered up within one month after the arrival of the Master in any port in his Majesty's dominions, to the collector and comptroller of some port in Great Britain, or the Isle of Man, or of the British plantations, or to the governor and so forth of Guernsey and Jersey; or if any foreigner shall have purchased or become entitled to the whole or a part of the ship, the certificate must be given up at the time and place mentioned in the statute, which vary according to the different circumstances therein mentioned.

Contents of certificate.

SEC. 813. The certificate[1] specifies the name, occupation and residence of every owner, in the proportions mentioned on the back of it, the name of the ship, the place to which she belongs, her tonnage, the name of the master, the time and place of the built or of condemnation, the name of the surveying officer, the number of decks and masts, the length, breadth, height between decks if more than one, or the depth of the hold if only one deck, whether rigged with a

[1] 3 & 4 Will. 4, c. 55, s. 2.

standing or running bowsprit, the description of her stern, whether carvel or clincher built, and gallery and kind of head, if there be any. And on the back are indorsed the names of the several owners, with the number of sixty-fourth shares held by each.

Of the ship's transfer.

SEC. 814. By the 31st section of the Registry Act, when and so often as the property in any ship,[1] or any part thereof, belonging to any of his Majesty's subjects, shall, after registry thereof, be sold to any other or others of his Majesty's subjects, the same shall be transferred by bill of sale, or other instrument in writing, containing a recital of the certificate of registry of such ship, or the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity; provided, always, that no bill of sale shall be deemed void by reason of any error in such recital, or by the recital of any former certificate of registry instead of the existing certificate, provided the identity of the ship therein intended be effectually proved thereby.

By the 34th section it is enacted that no bill of sale[2] shall be valid and effectual to pass the property in any ship, or in any share thereof, or for any other purpose, until such bill of sale shall have been produced to the collector and comptroller of the port at which such ship is already registered, or to the collector, etc., to any other port at which she is about to be registered *de novo*, as the case may be, nor until such collector, etc., respectively shall have entered in the book of such last registry, in the one case, or in the book of such registry *de novo*, after all the requisites of law for such registry *de novo* shall have been duly complied with, in the other case, of such ship, as the case may be (and which they are respectively thereby required to do upon the production of the bill of sale for that purpose), the name, residence and description of the vendor or mortgagor, or of each vendor or mortgagor, if more than one, the number of shares transferred, the name, residence and description of the purchaser or mortgagee, or of each purchaser or mortgagee if more than one, and the date of the bill of sale, and of the production of it; and further, if such ship is not about to be registered *de novo*, the collector, etc., of the port where such ship is registered shall, and they are thereby required to indorse the aforesaid particulars of such bill of sale on the certificate of registry of the said ship, when the same shall be

[1] The words of the act throughout are "ship or vessel."

[2] "Or other instrument in writing." *passim*.

produced to them for that purpose, in manner to the effect following; viz.—

'Custom-house [*port and date; name, residence, and description 'of vendor or mortgagor*], has transferred by [*bill of sale or other 'instrument*], dated [*date; number of shares*], to [*name, residence, 'and description of the purchaser or mortgagee*].

'A. B. Collector.'

'C. D. Comptroller.'

And forthwith to give notice thereof to the commissioners of Customs; and in case the collector, etc., shall be desired so to do, and the bill of sale shall be produced to them for that purpose, then the said collector, etc., are thereby required to certify, by indorsement upon the said bill of sale, that the particulars before mentioned have been so entered in the book of registry, and indorsed upon the certificate of registry as aforesaid.

By the 35th section it is enacted that when and so soon as the particulars of any bill of sale by which any ship, or any share or shares thereof, shall be transferred, shall have been so entered in the book of registry as aforesaid, the said bill of sale shall be valid and effectual to pass the property thereby intended to be transferred, as against all and every person and persons whatsoever, and to all intents and purposes, except as against such subsequent purchasers or mortgagees who shall first procure the indorsement to be made upon the certificate of registry of such ship, in manner thereinafter mentioned.

The 36th section enacts that when a bill of sale has been entered for any shares, thirty days shall be allowed for indorsing the certificate of registry, before any other bill of sale for the same shall be entered; but in case no person shall produce the certificate of registry for the purpose of being indorsed within the said space of thirty days, then it shall be lawful for the collector and comptroller to indorse upon the certificate of registry the particulars of the bill of sale, to such person or persons as shall first produce the certificate of registry for that purpose, it being the true intent and meaning of this act, that the several purchasers and mortgagees of such ship, share or shares thereof, when more than one appear to claim the same property, shall have priority, one over the other, not according to the respective times when the particulars of the bill of sale by which such property was transferred to them were entered in the book of registry as aforesaid, but according to the time when the indorsement is made upon the certificate of registry.

By the 11th section it is enacted that whenever such owner or owners shall have transferred all his or their share or shares in such ship the same shall be registered *de novo* before such ship shall sail or depart from the port to which she shall then belong, or from any other port which shall be in the same part of the United Kingdom, or the same colony, plantation, island, or territory as the said port shall be in.

Of the mutual rights of part owners.

SEC. 815. In most countries it seems to be in the power of the majority, either in number or value, of the part owners to send the ship on a voyage. In England, the majority in value are entitled to send out the ship "upon any probable design," subject to certain restrictions in favor of the rights of the dissentient minority.[1] Those restrictions are enforced by the Court of Admiralty, which has authority to arrest and detain a ship upon the application of a part owner who dissents from her intended employment, until security be given by the other part owners to the full value of his share. The practice has in some earlier instances been subject to some doubts; but it has entirely survived those doubts, and it has been formally recognized by the courts of common law and equity.[2]

In matters of this nature, the Court of Admiralty is not merely ministerial, for it compels the party authoritatively to find security; it likewise compels him to pay the sums stipulated in the bond given for the security.[3]

When a loss has happened, application may be made by the minority to have the bond declared forfeited. But the court will not always wait until an actual loss has been proved. It will sometimes declare the bond to be forfeited if the vessel does not return within a certain time, and if the vessel returns within that time, will dismiss the cited parties from the effect of the monition.[4]

In practice, the bond is frequently, perhaps generally, conditioned for the return of the vessel to a particular port. The form, however, as given in Abbott,[5] omits the mention of any particular port, and merely speaks of the return, and Sir Christopher Robinson expressed a doubt whether all bonds of this nature should not be limited to that extent. "When a vessel," he said, "is within the protection of the

[1] Beawes, 53; Abbott, 70.
[2] The Apollo, 1 Hagg. 306; Strelly v. Winson, 1 Vern. 297; Anon., 2 Ca. Ch. 86.
[3] The Apollo, *supra*.
[4] The Anne, and The Waterhen, 2 Hagg. 279, cited.
[5] Page 496 (Ed. Shee, p. 606).

country to which she belongs, she is in her general home, and the parties are restored, as to any legal remedies, to the situation in which they stood before the departure of the vessel." In the case which gave rise to this remark, it appeared that a vessel which had been bound to return to a particular port, being damaged by storms, was carried to another port in Great Britain, and there arrested in suits of salvage and wages, but the court held that while the vessel was within the jurisdiction of the court safe and unsold an application to have the bond forfeited was premature.[1]

When a bond is required and taken under the circumstances which we have mentioned, the dissentient part owners bear no portion of the expenses of the outfit, and are not entitled to a share in the profits of the undertaking; but the ship sails wholly at the charge and risk, and for the profits of the others.[2] It may happen that the dissentient part owners forbear to take these steps in the Court of Admiralty, but, in such case, they should expressly notify their dissent to the others, and if possible to the merchants also, who freight the ship, for although it may be doubtful whether the Court of Chancery would give relief to a part owner in respect of the loss of a ship sent to sea without his assent, yet, if a part owner expressly notify his dissent, that court will not compel him to contribute to a loss.[3]

The Court of Admiralty having jurisdiction to detain a vessel at the instance of one part owner, until the others give security to the extent of their shares, *à fortiori*, it must have such a jurisdiction to detain a vessel in a suit instituted by the real owner against a mere wrong-doer.[4] But this court has no jurisdiction to compel the sale of a part owner's interest under any circumstances,[5] and even though it has power to order, in the cases we have mentioned, security to be given on the footing of their respective shares, when the amount of these shares is apparent, still it has not that power when the amount is a subject of dispute. In such case the Court of Chancery will interfere, and by injunction restrain the sailing of the ship, till the amount of the share for which the security is to be given shall be ascertained.[6]

The Court of Chancery will likewise adjust the equitable rights of part owners after the ship has been arrested by process out of the

[1] The Margaret, 2 Hagg. 752.
[2] Abbott, 71, and see Knight v. Parry, 1 Show. 12; Davis v. Johnston, 4 Sim. 539.
[3] Horn v. Gilpin, Ambl. 255.
[4] Per Lord Tenterden, In re Blanchard, 2 Barn. & Cres. 244.
[5] Ouston v. Hebden, 1 Wils. 101.
[6] Haley v. Goodson, 2 Mer. 77. But the court will decline to interfere if the plaintiff has been guilty of delay. Christie v. Craig, 2 Mer. 137.

Court of Admiralty. In a late case, where a ship, upon which one part owner had expended a large sum of money, had been arrested by the other part owner, who had taken security for his share, the Court of Chancery held that though in consequence of the arrest the latter had precluded himself from sharing the profits of the voyage, he was, nevertheless, bound to pay his proportion of the expenses of the repairs and outfit incurred previously to the arrest; the whole of those expenses, or the benefit of them, having been included in the sum for which the security had been given.[1]

Rights of majority.

SEC. 816. With a view to give every encouragement to the equipment and employment of ships, the law of England enables a majority of part owners, in the manner and under the restrictions which have been mentioned, to employ the ship even against the will of the minority. But the law does not contemplate continual dissensions, and in many cases the minority of part owners will be induced from a variety of considerations, to yield to the wishes of the majority. Under such circumstances, however, the court will still be inclined to uphold the interests of the few against the encroachments of the many. In the case of Card v. Hope,[2] Card and Cannan (being owners of nine-sixteenth shares of a ship, and also husbands or managing owners) by deed sold five-sixteenths to Hope. The deed contained a covenant that Hope should be appointed to the command of the ship, and that Card and Cannan should continue to have the management as husbands, and should elect the tradesmen and appoint all the officers, and that if Hope should relinquish the command, or die, Card and Cannan should appoint such fit person to succeed him, as might be approved by him or his executors, or that he or they might nominate a fit person to the command in his stead, and that Card and Cannan should be employed as the agents of Hope in the concerns of the ship, and if Hope should be minded to sell all or any of his shares, he might do so, upon condition that the purchasers should abide by the stipulations in the deed, and not remove Card and Cannan, or the survivor of them, from being managing owners, so long as they should perform the stipulations on their part. It was held that, although the covenant to continue Card and Cannan as Hope's agents in the concerns of the ship might be lawful if it stood alone, yet the deed being founded on a contract for the sale of the shares, with a stipula-

[1] Davis v. Johnston, 4 Sim. 539.

[2] 2 Barn. & Cres. 661; 4 Dowl. & Ryl. 164.

tion for the appointment to the command, and the continuance of the management, is was illegal and void. Lord Tenterden, in delivering the judgment of the court, said: "A power of employment vested in the majority seems to import a power of appointing officers, and in practice the majority certainly exercise that power. But such a power carries with it a duty, the duty of exercising a free and impartial judgment in the choice of every person who is to be intrusted with the management of the outfit, and with the navigation of the ship, *ut dentur digniori.* And any contract which is calculated to have the effect of fettering the judgment, and of binding the party to concur in the nomination of particular persons, at the peril of an action, is a violation of that duty. All part owners ought to share ratably in every profit that may be made of the ship, and if such contracts could be allowed by law, they must operate as a discouragement to persons to become part owners of ships. The duty is owing not only to the charterers and other part owners of a ship, but also to all whose life or property may be embarked in her. With regard to the other owners, although it may be true that, by becoming owners at the time when the majority of the interest was vested in the plaintiffs, they knew that this majority of interest might, as it respects themselves, carry with it every power for the exercise and continuance of which this deed provides, yet they might rely, for the faithful exercise of every authority, on the interest which the plaintiffs had in the prosperity of the ship, as being paramount to all other considerations. But this deed is calculated to deprive them of that security."

We will conclude this subject by observing that if the minority happen to have possession of the ship, and refuse to employ it, the majority may, by a similar warrant from the Court of Admiralty, obtain possession of it and send it to sea, upon giving proper security.[1]

Ship's husband — Duties of.

SEC. 817. In order to administer the affairs of the ship with unanimity, it is usual to appoint a *ship's husband.* He may be either a part owner or a stranger, and may be appointed by writing or by parol. His duties are to see to the proper outfit of the vessel, to have a proper master, mate, and crew, to see to the furnishing of provisions and stores, to see to the regularity of all the clearances from the custom-house, to settle the contracts, to enter into proper charter-parties, or

[1] Abbott, 72.

engage the vessel for general freight, to settle for freight, and adjust averages with the merchant, to preserve proper certificates and documents in case of future disputes with insurers or freighters, and to keep regular books of the ship.[1] But without special powers he cannot borrow money generally for the use of the ship, though he may settle accounts and grant bills for them, which will form debts against the concern.[2] Nor can he, without special authority, insure the ship.[3]

The ship's husband will be entitled, on the failure of the owners, to claim for the balance of his advances and commission, to claim in relief of bills and engagements in his own name for the price of repairs, furnishing, etc., and to hold a lien, for his security and indemnification, over the documents and warrants of the ship, and over the freight recovered, or which he has been empowered to recover.[4]

Duty of part owners as to expenses.

SEC. 818. Before a voyage is commenced, it is the duty of each owner to contribute his share of the capital for the expenses of the outfit. Hence, if one part owner advances the share of another, or if the ship's husband, being a part owner, at the request of the others, advances their shares for them, that constitutes a debt which he is entitled to recover at an action of law, independently of the profits of the voyage.[5]

The *delectus personæ* does not hold between part owners. Hence, though by the law marine, it was required that a new-built ship should make one voyage upon the common risk, before the owners should be allowed to separate, yet, by the law of England, any owner may sell or transfer his right at what time he pleases.[6]

Although, in the ordinary course of trade, one partner may sell the goods of the partnership, and, indeed, may dispose of the whole property of the partnership, supposing such a measure to be beneficial, yet this rule does not extend to part owners. The interest of part owners is so far distinct, that one of them cannot dispose of the share of another; and, although the master himself be a part owner of the ship, yet will not his sale thereof be good for more than his own part.[7]

We shall reserve for another section the consideration of the liabil-

[1] 1 Bell's Comm. 410; Beawes, 407; Sims v. Brittain, 4 B. & Ad. 375.
[2] 1 Bell's Comm. 411.
[3] French v. Backhouse, 5 Burr. 2727.
[4] 1 Bell's Comm. 411.
[5] Helme v. Smith, 7 Bing. 709.
[6] Molloy de Jur. Mar. 222.
[7] Abbott, 8.

ities of the part owners for the acts of each other. But it may here be observed shortly that one part owner may bind his fellow by contracts for repairs and necessaries.[1] He has, however, no implied authority to order insurances to be effected on account of the other part owners,[2] and, therefore, he cannot, by so doing, charge the others with any part of the premium, unless they afterward assent to the insurance,[3] though a joint authority to him to insure may be presumed from the acts of the co-owners.[4] Nor can he, though he be ship's husband, pledge the others to the expenses of a lawsuit.[5]

It has been said that one part owner may sell his vote in an election of a captain, and that the money received not being a profit of the ship, a bill will not lie againt him by the other part owners for an account of the money so received.[6]

Rights of, between themselves.

SEC. 819. Part owners being tenants in common, one cannot maintain trover against the other for detaining, or even for forcibly taking and carrying away the ship; *secus*, if the delinquent part owner destroy the ship.[7] It has likewise been held that one part owner cannot recover damages from another part owner for fraudulently and deceitfully sending a ship on a voyage and selling it abroad.[8]

The ordinary remedy for part owners to obtain an adjustment of the ship's account among themselves is a suit in a court of equity. But, in a case where several part owners entered into a written agreement, whereby they and each and every of them did agree to and with the others and each and every of the others, that the ship should proceed on a certain voyage, and be under the exclusive management and control of one of the parties as husband thereof; and that, after the ship's return, a full account should be made out of the ship and her concerns, and the neat profits be divided according to the proportions; it was held that each individual party to the agreement might maintain an action at law upon it against him who had acted as the husband, for not making out an account and dividing the profits within a reasonable time after the ship's return.[9]

It may here be observed that a covenant to pay a certain sum of

---

[1] See Gowan v. Foster, 3 B. & Ad. 507.

[2] Hooper v. Lusby, 4 Camp. 66.

[3] Bell v. Humphries, 2 Stark. 345; Ogle v. Wrangham, Abbott, 8.

[4] Robinson v. Gleadow, 2 Bing. N. C. 156.

[5] Campbell v. Stein, 2 Dow. 135. The other doctrine laid down in this case seems now to be overruled.

[6] Moffat v. Farquharson, 2 Bro. 338.

[7] Bernardiston v. Chapman, 4 East, 121; Abbott, 71.

[8] Graves v. Sawcer, Sir T. Raym. 15.

[9] Owston v. Ogle, 13 East, 358; Abbott, 80.

money yearly, in lieu of the profits of a vessel, as a part owner, is not discharged by the capture of the vessel, provided the property be not altered by legal condemnation.[1]

To a bill filed between part owners for an account of the profits of the ship, all the part owners must be parties; it is not sufficient to allege that the bill is brought by some of the part-owners on behalf of themselves and all others, except the defendants,[2] unless, indeed, which is rarely the case, the great number of the parties should make it necessary to frame the suit in this manner.[3]

Of the relative rights of part owners and third persons.

SEC. 820. According to modern opinions the liability of part owners to third persons is not in any manner affected by the Registry Acts. "Title," said Lord Ellenborough, "has nothing to do with these cases, we must look to the contract between the parties."[4] And in a subsequent case, Lord Tenterden said that the acts enable a person to ascertain who are the legal owners of a vessel, but that might be ascertained *aliunde*, and if the legal owners would not at common law be liable to demands for repairs and necessaries merely on account of their ownership, he could not think that they were so by reason of any thing to be found in the Registry Acts.[5] And in another case his Lordship observes, "The object of the legislature in passing these statutes was clearly one of general policy, namely, to prevent foreigners from participating in the advantages which it was intended to give to British shipping only, and the use of the registry is to enable the government to ascertain, at all times, that the real owners are British subjects. Soon after the passing of these acts, the leading of courts of law in the construction of them was to say that the registered owners of ships should at all events be liable for repairs, but the subject having become more accurately understood, a better and more correct principle now prevails, and the recent cases have decided that the true question in matters of this description is, "upon whose credit was the work done?"[6]

Various modern cases have been decided in conformity with these principles. Thus, in M'Iver v. Humble,[7] Humble & Holland were partners and part owners. A few months after the dissolution of the

[1] Grigg v. Stoker, Forrest, 4.
[2] Moffat v. Farquharson, 2 Bro. 338. In an edition of Browne, by Mr. Belt, it is said that this case is clearly wrong, and has been repeatedly overruled. But there seems to be no ground for this observation.
[3] Story's Eq. Pl., § 166.
[4] Annett v. Carstairs, 3 Camp. 354.
[5] Briggs v. Wilkinson, *infra*.
[6] Jennings v. Griffiths, Ryan & Mood. 42.
[7] 16 East, 169.

partnership, Humble's interest in the ship was conveyed away by a defective transfer. In order to aid this defect, Humble afterward joined in another transfer of his interest, and for this purpose his name appeared in the indorsement of the certificate. Between the times of the respective transfers, a quantity of rope was supplied for the use of the ship, and it was sought to charge Humble with the price of this rope on the evidence of the certificate and indorsements, but the Court of King's Bench held that he was not liable.

So, in a case where a mortgage had been made of a share of a ship, it was sought to charge the mortgagee for repairs, etc., as owner, on the ground that it was not expressed in the certificate of transfer according to the provisions of the 4 Geo. 4, c. 41, that the transfer was for a mortgage, but the Court of King's Bench held that this circumstance did not render the mortgagee liable.[1]

However, in a case where there were two joint owners of a ship, and one by private agreement parted with all his interest in his share to the other, to be paid for by bills at different dates, but kept his name on the register by way of collateral security for the payment of bills, it was held that he was liable for repairs done to the ship subsequent to such agreement, although he had never afterward interfered in the concern or management of the vessel.[2]

In the preceding cases the person sought to be charged was one whose name appeared on the register, but whose beneficial interest was denied. If the person charged have a beneficial interest as part owner, but be not named in the register, in other words, if he be a dormant or secret part owner, it should seem, on the authority of one case, that he will not be liable for necessaries furnished to the ship. In Harrington v. Fry,[3] goods had been ordered of the plaintiff by Wilsford, a part owner of the vessel, on his own account and that of the owners; at the time of the order Wilsford did not name the defendant as owner; the defendant's name was not on the register, nor did the plaintiff ever hear of him as an owner till the commencement of the action. Evidence, however, was adduced which connected the defendant with the ship, though it turned out that the conveyance, under which he had taken his share, was defective for want of compliance with the registry acts. The Court of Common Pleas held that he was not liable for the price of the goods. They said that a man can only be charged in respect of his property in a

[1] Briggs v. Wilkinson, 7 Barn. & Cres. 30; and see Jennings v. Griffiths, Ryan & Mood. 42.

[2] Dowson v. Leake, Dowl. & Ryl. N. P. C. 52.

[3] 2 Bing. 179; 9 Moore, 344.

ship either upon credit given him, or as legal owner, or as having holden himself out as legal owner. That, in the present case, the defendant never held himself out as owner; the plaintiff never knew he was owner; and the contract was made, not with any individuals by name, but with the owners generally; which distinguished this from other cases where credit was given to certain persons by name, though they had ceased to be owners. That the conveyance was mere waste paper; that by reason of its informality no interest passed, not even an equitable interest. That, though the defendant was not the true owner, he might have been charged if he had held himself out as owner; and in such case the defectiveness of the conveyance would not have availed him. But the defendant was neither held out as owner, nor did the plaintiff consider him as such at the time of the contract, and if he had consulted the registry of the custom house he would have seen that he was not owner. That the defendant had no interest in the ship, he had never held himself out as owner, nor was credit ever given to him, and therefore he ought not to be charged. [1]

It is difficult, however, to sustain this decision, consistently with the principles laid down in other cases. For, first, if, as has been generally admitted, the registry acts are no criterion of the credit to be given or refused to part owners,[2] the observation that the plaintiff might have consulted the registry seems irrelevant. Secondly, if, as we shall presently endeavor to show, the contract of one part owner in matters relating to the ship is the contract of all, it follows that credit given to one part owner is credit given to all. If, therefore, the defendant was a part owner, it can hardly be said that the goods were not furnished on his credit. Lastly, the defendant, for the purposes of this action, was a part owner; for, admitting that the registry acts might avoid his interest, as between himself and his co-owners—a proposition, however, which may be doubted [3]—yet, it seems clear that this would not be the case as between the defendant and the plaintiff, who was a stranger, it being a general rule of law that the words of a statute are not to be construed so as to extend beyond the mischiefs contemplated by the act; where such construction would be injurious to the interests of third persons. [4]

This last remark on the construction of the Registry act, as against

[1] It is said in the Reports that the defendant never shared the profits of the vessel, but the court took no notice of that circumstance.

[2] 16 East, 176.

[3] See the judgment of Wood, B., in Hubbard v. Johnstone, 3 Taunt. 203.

[4] See and consider Edwards v. Dick, 4 Barn. & Ald. 212.

strangers, appears to be corroborated by a decision of Lord Stowell. The case before his Lordship was certainly one of tort, and not of contract, but his observations seem to be of a general application. The suit was instituted by a foreigner, a Spaniard, against the representatives of the deceased part owner of an English privateer, to recover damages and costs for the capture of a Spanish vessel in time of peace. The defense was, partly, that the deceased was not himself the wrong-doer, and partly that his name had never been inserted in the bill of sale or ship's register. Lord Stowell, in decreeing for the plaintiff, said that a person had a legal right to have his name inserted in the register. Even if he should not be entitled to the benefits which might be acquired as an owner of the privateer, it did not follow that he was to be exempted from the losses which might be sustained in that capacity. He could have no right to plead his own laches in order to relieve himself from the claims of others as adverse to him.[1]

Power of agents or part owners as to repairs.

SEC. 821. In the case of a ship, as of other property, an agent may make himself or his principal liable for repairs. In all that concerns the repairs and necessaries of the ship, one part owner is agent for the other part owners; and where the ship is under the management of the master, and the owners divide the profits, the master is agent for them all.[2] By our law, therefore, which in this respect differs from the civil law, every one of the part owners is answerable *in solido* to the tradesman who builds or fits out the ship.[3] Hence, if a tradesman, who has repaired a ship, take from some of the part owners sums equivalent to their shares, they still remain responsible for the residue, if not paid by the others, unless at the time of the payment

[1] The *Nostra Signora de los Dolores*, 1 Dods. 290.

[2] 7 Barn. & Cres. 35; 2 Rose, 92; Story on Agency, ch. 4, § 40. And where the master makes no contract personally, but the owners themselves contract, they are *alone* liable, and not the master. Farmer v. Davies, 1 T. R. 108. Otherwise, an action will lie against either master or owners. Samsun v. Braginton, 1 Ves. 443.

[3] 1 Ves. 498, and see Samsun v. Braginton, 1 Ves. 443. It is observed in Abbott, citing Vinnius, that, by the law of Holland, the several part owners are chargeable only according to their respective interests. See also Vanderlinden's Institutes, by Henry, 616. In France, the contract of partnership is regulated by the civil law, by the laws peculiar to commerce, and by the agreements of the parties. Code de Commerce, art. 18. It is apprehended that the liabilities of the part owners are regulated by the civil law. Now, the civil law gives an action against any one part owner upon a contract made by the master to the full extent of the demand, but, in the case of contracts made by the part owners themselves, holds each to be chargeable only in proportion to his own share of the ship. Abbott, 84.

the tradesman, upon good consideration, such as payment before the expiration of the usual credit, specially agree to discharge them from all further demand.[1]

Even although credit be given to one part owner particularly, the contract for the repairs being entered into with one alone, that of itself does not exclude the creditor from resorting to the other part owners for payment of his debt. To accomplish this end the creditor must be expressly excluded by the terms of the contract.[2] And in a late case, where the person who ordered the repairs was ship's husband, and the part owner charged in the account was unknown at the time of the order, and being a female, took no part in the management of the vessel, Tindal, C. J., held that she was liable, and observed, that in order to constitute *exclusive* credit, there must be a *giving up* of the owners generally, and the making an exclusive bargain with the person who orders the goods and an agreement to furnish them on his credit only.[3]

It seems doubtful, however, whether one part owner can bind his fellow by *bills of exchange*, even for repairs.[4] But admitting that he might so bind him on the ship account, yet, as it is clear that he cannot bind him by bill on any other account, a part owner will not be liable even to a *bona fide* indorsee, if he can show that the bill was given on another account.[5] It may here be observed, that in a case *Nisi Prius*, Lord Ellenborough was of opinion that a creditor taking the separate bill of the ship's husband, a part owner, for stores supplied to the ship, discharges the other part owners.[6]

The liability of part owners in the cases we have mentioned cannot, of course, be affected by any private arrangement between themselves. In Rich v. Coe[7] an action was brought to recover the value of necessaries furnished to Harwood, the captain, for the use of the ship. The defendants were owners, and had let the ship to Harwood upon certain articles, by which it was covenanted that Harwood should employ her to his sole benefit and advantage, and should pay a rent for her, and should "at all times, at his own cost and charge, repair, maintain, and keep the vessel, her tacking, rigging, etc., in good and sufficient repair," etc. The plaintiffs had no notice of this contract when they supplied Harwood with the goods. The question was,

[1] Teed v. Baring, Abbott, 84 (Ed. Shee. 101).
[2] Ex parte Bland, 2 Rose, 91.
[3] Thompson v. Finden, 4 Car. & Payne, 158. Perhaps, however, the parties were in this case partners.
[4] D. *arg.* 10 Barn. & Cres. 135.
[5] Williams v. Thomas, 6 Esp. 18.
[6] Reed v. White, 5 Esp. 122.
[7] Cowp. 636; and see Gleadon v. Tinckler, Holt, 586.

whether the defendants were liable. Lord Mansfield: "Whoever supplies a ship with necessaries has a treble security. 1. The person of the master. 2. The specific ship.[1] 3. The personal security of the owners. The creditors trust specifically to the ship, and generally to the owners. In this case the defendants are the owners, and there happens to be a private agreement between them and the master, by which he is to manage and keep her in repair, etc. But how does that affect the creditors, who, it is expressly stated, were total strangers to the transaction?"

Distinction between part owners and partners.

SEC. 822. But part owners, though jointly liable to the persons with whom they contract on account of the ship, yet in many respects stand in a very different situation from that of partners. Thus, it has been ruled that the admission of one part owner as to a subject of part ownership is not binding on the others.[2] One reason assigned by a learned judge for this difference is, that in the case of a partnership every man knows who his partner is; but when one part owner sells his share, the remaining part owners, not being privy to the instrument by which the new part owners are created, may be entirely ignorant of the fact who the person is who has become a part owner with them.[3] It is to be observed, however, that this reason would extend to all contracts made by the part owners, and that it is not necessary for the support of the other powerful observations of the same learned judge in the same case.

The case here referred to is that of Wilson v. Dickson,[4] which depended on the construction of the 53 Geo. 3, c. 1, s. 9, and by which it is settled that one part owner will not incur additional liability for losses occasioned to the shippers by the mismanagement of the master, from the circumstance that the master is likewise a part owner. By the 53 Geo. 3, c. 159, s. 1, it is enacted that no owner or owners, or part owner or part owners, of any ship, shall be liable for any loss or damage arising by reason of any matter or thing done, omitted or occasioned without the default or privity of such owner or owners, which may happen to any goods, etc., put on board the ship, further than the value of the ship, and the freight due or to grow due for and during the voyage. In the case in question an action was brought against three joint owners of a ship, on account of the loss of certain goods therein laden belonging to the plaintiff,

[1] On this point see Abbott, 109.
[2] Jaggers v. Binnings, 1 Stark. 64.
[3] Per Bayley, J., 2 Barn. & Ald. 15.
[4] 2 Barn. & Ald. 2.

the nature of the loss being the improper sale of those goods in the course of the voyage by the captain, who was also a part owner. One question was, whether, inasmuch as there was fault or negligence on the part of one of the three owners, that circumstance took away the protection given by the statute to the other part owners? The court held that it did not; and, consequently, that the other part owners were not liable beyond the value of the ship and freight, the value of the ship being calculated at the time of the loss, and the freight being deemed to include money paid in advance.

Neither will the share of one part owner be liable to condemnation for acts done by his copartner without his privity. Where one of several part owners is owner of the whole cargo, condemnation of the cargo will carry with it condemnation of his share of the ship. But the shares of the other part owners will remain safe, if they can show by attestation that they had no knowledge of the contraband goods.[1]

But part owners are answerable *in solido* for costs and damages for wrong capture and condemnation of another ship.[2]

Of actions and suits by and against part owners.

SEC. 823. It is laid down by a high authority that in an action for the freight of goods, conveyed in a general ship, all the part owners ought to join as plaintiffs, or, if they do not, the defendant may avail himself of the objection by evidence at the trial, and without plea in abatement, unless, perhaps, some one should have received his own share, or released his claim to it. It is added that the necessity of all the part owners joining as plaintiffs is founded on the consideration that all of them are partners with respect to the concerns of the ship.[3]

And even if the part owners authorize their agent to sell the entire ship, they cannot, if they give him a joint authority, maintain separate actions against the agent for their respective shares of the money received by him on account of such sale, though each may maintain a separate action if they separately authorize the agent to sell their respective shares.[4]

But it is to be observed that the situation of part owners differs in many respects from that of partners, and not the least in this circumstance, that the interest of the former in the profits of their

[1] The Jonge Tobias, 1 Rob. 329.
[2] The Karasan, 5 Rob. 291; Praris v. Martine, 2 Stair, 819.
[3] Abbott, 182 (Ed. Shee. p. 98). *Contra*, Stanley v. Ayles, 3 Keb. 444.
[4] Hatsall v. Griffith, 4 Tyr. 487; 2 Cro. & Mee. 679.

trade is, comparatively speaking, an ascertained interest. Hence, it seems that admitting the original interest of the part owners in the profits of the ship to be joint, that will not prevent them from suing separately for their respective shares of the profits, where the covenant or agreement for payment of those profits is separate, and it is clearly intended that they should have a separate interest under the covenant or agreement. In Owston v. Ogle,[1] it was jointly and severally agreed between part owners and the ship's husband, who was one of the part owners, that the management and expenses of the ship should be under the control of the husband, and that, after the ship returned from her voyage, a full account should be made out of the ship and her concerns, and the profits divided; it was held that an action might be maintained by either of the part owners against the husband for not making out such account and dividing the profits. In a subsequent case,[2] the law on this count seems to have been confirmed. A covenant was entered into by the master of a vessel with the several part owners and their several and respective executors, administrators, and assigns, to pay such sum as should be allowed to the owners by the postmaster-general for the hire of the ship, unto the owners, and to their and every of their several and respective executors, administrators, and assigns, at a certain banker's and in such proportions as were set against their several and respective names, this was construed to be a several covenant, and as giving to each a several interest; and it was held that each covenantee must sue severally in respect of such several interest, and that they could not maintain a joint action.

In an action *ex contractu* by part owners against their agent, the defendant cannot dispute their title by showing it to be defective under the registry acts.[3]

In an action of tort by part owners for any injury, for instance, done to the ship, all the part owners ought to be plaintiffs, but the defendant can only take advantage of the defect by plea in abatement. So, in action of trover, all the part owners ought to join as plaintiffs, though one only may bring trover for the whole ship if the defendant do not plead in abatement.[4]

Who should be sued.

SEC. 824. In an action against part owners upon any contract relat-

[1] 13 East, 538.
[2] Servante v. James, Lloyd & Welsby, 54; 10 Barn. & Cres. 411.
[3] Dixon v. Hamond, 2 Barn. & Ald. 310.
[4] Addison v. Overend, 6 T. R. 766, Dockwray v. Dickenson, Comb. 366; Skin. 640.

ing to the ship, all should be sued jointly; but the defendants can only avail themselves of the objection by plea in abatement.[1] The same observation seems to be applicable to actions *ex quasi contractu* against part owners.[2] However, if the creditor were ignorant at the time of the contract, that there were other part owners, he may sue him alone to whom the credit was given, and the defendant cannot plead the non-joinder of the other part owners in abatement.[3]

In an action by an attorney against one of several part owners whose interest is insured, for business done for the assured, the defendant may plead in abatement the non-joinder of the assignees of his bankrupt co-part owners.[4]

The rule that joint and separate debts cannot be set off against each other, applies as well to part owners as partners. Therefore, upon the bankruptcy of a person separately indebted to each of the part owners of a ship, they cannot set off their proportions of a debt due from them jointly to the bankrupt on the ship account against the debts due by the bankrupt to them separately.[5]

In actions against part owners for stores supplied to the ship, it used to be the custom to produce the register as proof of their title, and the proof was received without question or objection. But it is now held that the register alone does not furnish even *prima facie* evidence to charge a person as owner of a ship, in a suit between private individuals. Hence, in an action for stores supplied to a ship, if the defendant pleads in abatement that he is only liable jointly with others, it is not enough for him to produce the ship's registry, containing the names of himself and those others as owners of the ship.[6]

To a bill by a creditor, for an account and payment of moneys due from part owners on the ship account, all the part owners or their representatives should be made parties.[7] But, on demurrer by one of several part owners for non-joinder of his co-part owners as defendants, the plaintiff will be permitted to amend his bill, on payment of the costs incurred by the defendant.[8]

Where a bill was brought by the officers and crew of a ship against

---

[1] Abbott, 81 (Ed. Shee. p. 100); Attorney-General v. Borrodaile, 1 Price, 162.

[2] Doo v. Chippenden, Abbott, 76; Baldney v. Ritchie, 1 Stark. 388.

[3] Pasmore v. Bousfield, 1 Stark. 296.

[4] Ex parte Christie, 10 Ves. 105.

[5] Flower v. Young, 3 Camp. 240. See Abbott, 68.

[6] Pierson v. Robinson, 3 Swanst. 139 n; Coppard v. Page, Forest, 1.

[7] East India Company v. Neave, 5 Ves. 185; Mitf. 215. Whether a part owner or partner could demur for misjoinper of co-defendants, *quære*, and see Pringle v. Crooks, 3 You. & Coll. 666.

the owners, for an account of captures, etc., it was held that it might be alleged to be brought by the plaintiffs on behalf of themselves, and all others in the same interest.[1]

[1] Good v. Blewitt, 13 Ves. 397.

CHAPTER XXXVII.

OF PARTICULAR PARTNERSHIPS.

SEC. 825. Of joint-stock companies in general.
SEC. 826. Of the Bubble Act.
SEC. 827. Later acts.
SEC. 828. Repeal of the statute and its consequences.
SEC. 829. Who are to be treated as usurping powers of a corporation.
SEC. 830. Test of legality as to joint-stock companies.
SEC. 831. What makes one a partner in.
SEC. 832. What constitutes an actual partner in.
SEC. 833. By holding out.
SEC. 834. Liability of promoters or provisional directors.
SEC. 835. Liability of the company.
SEC. 836. Legal remedies affecting companies, members of, and strangers.
SEC. 837. Of the formation of — Evidence to charge one as shareholder.
SEC. 838. Where there has been no waiver of formalities.
SEC. 839 Where the prescribed formalities have been apparently waived.
SEC. 840. As between company and alleged shareholder.
SEC. 841. As between alleged shareholder and a creditor.
SEC. 842. Cost-Book Mining Companies.
SEC. 843. Of chartered companies.
SEC. 844. Of companies under letters patent.
SEC. 845. Of the mutual rights of shareholders.
SEC. 846. When company is projected, but never formed.
SEC. 847. Every party suing must be named.
SEC. 848. Deed of settlement, what it should set forth.
SEC. 849. The general law of partnership applies when the deed of settlement does not provide remedies.
SEC. 850. When shareholders may proceed in equity against the directors.
SEC. 851. Of the relative rights of shareholders.
SEC. 852. Liability of shareholder of unincorporated company.
SEC. 853. Powers of agent or manager of company.
SEC. 854. Unincorporated companies — Liability of.
SEC. 855. Of the management of companies.
SEC. 856. Of companies under 7 & 8 Vict. — Managing body.
SEC. 857. As to shareholders.
SEC. 858. As to managing body.

SEC. 859. As to shareholders of statutory companies.
SEC. 860. Of the sale and transfer of shares.
SEC. 861. Of the relinquishment of shares, and of the right to retire.
SEC. 862. Of the forfeiture of shares and the right to expel.
SEC. 863. Of suits in equity between company and strangers.
SEC. 864. Grounds on which equity will interfere.
SEC. 865. When will enjoin.
SEC. 866. Ex parte injunctions
SEC. 867. Will restrain company from acting in excess of authority.
SEC. 868. When injunction will be refused.
SEC. 869. Suits in equity among the shareholders of joint-stock companies.
SEC. 870. Dissolution when all partners cannot be present.
SEC. 871. Account without dissolution.
SEC. 872. General discussion of question.
SEC. 873. Demurrer.
SEC. 874. Plea.
SEC. 875. Answer.
SEC. 876. Injunctions against directors, etc.
SEC. 877. An injunction has been refused to restrain.
SEC. 878. Actions at law against companies.
SEC. 879. Of the recovery back of subscriptions to companies.
SEC. 880. Of actions between companies and their shareholders.
SEC. 881. Of actions for calls.
SEC. 882. Of actions for dividends.
SEC. 883. Of set-off, by and against companies.
SEC. 884. Of executions against companies and their shareholders.
SEC. 885. As to executions against company or person named in judgment.
SEC. 886. As to proceedings against shareholders upon judgment against company.
SEC. 887. As to shares.
SEC. 888. Termination of liability.
SEC. 889. When shares in companies are specifically bequeathed.
SEC. 890. Profits — Division of.

Of joint-stock companies in general.

SEC. 825. Companies not trading upon a joint-stock, or, in other words, *regulated companies*, have existed from very early times. Perhaps the most ancient is that of the *Merchants Adventurers*, better known in modern times by the name of the Hamburgh Company.[1]

[1] Anderson's Hist. Commerce, Vol. 1, p. xxv. When companies do not trade upon a joint-stock, but are obliged to admit any person properly qualified, upon paying a certain fine, and agreeing to submit to the regulations of the company, each member trading upon his own stock and at his own risk, they are called regulated companies. Smith's Wealth of Nations, Book 5, chap. 1; and see Encyc. Brit., tit. Company; Montefiore, tit. Company. Dr. Adam Smith enumerates several regulated companies, which are all for foreign commerce; but he observes that regulated companies resemble, in every re-

The privileges of this company, which were obtained from John Duke of Brabant, were confirmed by letters patent of King Edward the Third, and have been, it is believed, uniformly recognized by succeeding monarchs.[1] The East India Company, which was established in 1599, was one of the first which traded upon a joint-stock. That company, however, likewise partakes of the nature of a regulated company, and it has not been, until comparatively modern times, that joint-stock companies, in the popular sense of the expression, have been in any degree encouraged. These, however, have become, of late years, so numerous and important, that it seems proper to trace the legal opinions which have from time to time existed respecting them, and to that end to examine, as concisely as possible, the circumstances of their origin, suppression, and revival. In subsequent sections we shall endeavor to point out in what manner and to what extent they are affected by the general law of partnership.

It ought, however, to be premised, that our remarks on trading associations will be confined to this last class of companies, they alone coming within the scope and design of this treatise. By joint-stock companies, therefore, is here intended those which are unincorporated and which trade upon a joint-stock.[2]

History of the bubble act, and remarks on the legality of joint-stock companies.

SEC. 826. In the year 1711, the debts of the Navy being found to amount to more than five millions, and there being other public debts of a large extent, Harley formed a scheme of raising a fund for the payment of 6*l. per cent* interest on those debts, by making permanent all the duties on wines, vinegar, tobacco, India goods, wrought silks, whale fins, etc. With a view to give further satisfaction to the public creditor, he formed the additional project of granting a monopoly of a trade to the South Sea, or coast of Spanish America, to the several proprietors of this funded debt, and of incorporating them for the purposes of such trade.[3]

Accordingly, by the 9 Anne, c. 21, s. 1, reciting the various debts, and that "her Majesty's most dutiful and faithful subjects, the Com-

---

spect, the corporation of trades so common in the cities and towns of all the countries of Europe. In fact, there seems to be no difference between them.

[1] Malyne, Lex Mercat. chap. 42.

[2] As to the rights and liabilities of companies which are incorporated and trade upon a joint-stock, see Beverley v. Lincoln Gas Light Company, 6 A. & E. 828, and the several cases there cited. It appears that these companies may now be sued in *indebitatus assumpsit* for goods sold and delivered, though the contract be not under seal, but that they cannot be sued on their acceptance, unless they have a power given to them expressly or impliedly from the object of the corporation to accept bills.

[3] Coxe's Walpole, Vol. 1, p. 126; Tindal, Vol. 4, p. 204.

mons, being duly affected with the deepest sense of the happiness they enjoyed under her Majesty's most gracious and wise administration; and being truly desirous to do all that became dutiful and faithful subjects, to render happy and glorious the reign of the best of sovereigns; and having taken into their most serious consideration all the said debts and deficiencies, and the many ill consequences which might arise to the public thereby if not timely remedied; and being heartily zealous to preserve the honor of her Majesty and the nation, and to establish the public credit, and to enable her Majesty to prosecute the war so necessarily entered into, with the utmost vigor, until such a peace should, by the blessing of Almighty God, be obtained, as might be for the honor of her Majesty and the lasting security of her kingdoms," etc., it was enacted, that the impositions we have mentioned on wines, etc., should be in full force for ever. By the 25th section of the same act, reciting that it would be for the great ease and advantage of the persons concerned in the said debts and deficiencies, that they should be made one company; and to "the end and intent that the trade to the South Seas, and other parts within the limits thereinafter mentioned, might be carried on, for the honor and increase of the wealth and riches of the realm," it was enacted that her Majesty might, by letters patent, incorporate the persons interested in the public debts intended to be provided for by the act. The subsequent sections relate to the powers, constitution, and management of the company, and the limits of their trade.

Such was the origin of the South Sea Company. But the advantages expected from this act of Parliament turned out to be visionary. By the peace of Utrecht, Spain and the Indies being confirmed to Philip the Fifth, that monarch was too jealous to admit the English to a free trade in the South Sea; and instead of the advantageous commerce which Harley had held forth, the company obtained only the *assiento* contract, or the privilege of supplying the Spanish colonies of America with negroes for thirty years, with the permission of sending to Spanish America an annual ship, limited both as to tonnage and value of cargo: of the profits of which the King of Spain reserved to himself one-fourth, and 5*l.* per cent on the other three-fourths.[1] It is manifest from this, that the hopes which had been held out to the company, of a free trade to the South Seas, were delusive. The company was accordingly, from time to time, bolstered up by acts of favor on the part of the Monarch or of the Legislature,[2]

[1] Coxe, vol. 1, p. 127.

[2] Anderson's Hist. Commerce, vol. 2, pp. 266, 267.

and ultimately was made the means of the most notorious deception and the most extensive ruin

The King, at the commencement of the session of 1719–20, had recommended the Commons "to turn their thoughts to all proper means for lessening the debts of the nation." To attain this end, the primary object of the government was the reduction of the irredeemable annuities created in the reigns of William and Anne, for long terms of years, amounting to 800,000*l.* per annum.[1] A scheme was laid to reduce all the public funds into one. The South Sea Company and the Bank of England presented their several proposals to the House of Commons. The liberty of taking in the national debts, and, consequently, of increasing their capital stock and yearly fund was looked upon as a very valuable benefit. The contest, therefore, between these two companies was very great, but the South Sea Company, being resolved at all hazards to enjoy the privilege held forth to them, made an offer amounting in the whole to 7,567,500*l.* The offer was accepted by the Minister, and, accordingly, the act of 6 Geo. 1, c. 4, was passed "for enabling the South Sea Company to increase their present capital stock and fund, by redeeming such public debts and incumbrances as are therein mentioned," etc.

At the time when this act was passed the public rage for speculation was at its greatest height. It cannot, perhaps, be said that the conduct of the South Sea Company was the sole cause of the spirit of adventure which was abroad, because a few years before this period we read of bubbles sufficiently important to attract the notice of the Legislature.[3] It is certain, however, not only that the acts of this company increased the prevailing excitement, but that they were unable to fulfill their engagement with government without further availing themselves of that love of gainful enterprise which had seized the public mind.[4] Imaginary advantages were accordingly held forth; groundless and mysterious reports were circulated concerning valuable acquisitions in the South Sea; dividends of ten, thirty, and even fifty per cent were voted, which the directors knew could never be paid and for which there was no foundation. Nor were boastings and exaggeration confined to the profits of the scheme. Rumors were spread that the company, by monopolizing the national debt, would reduce the government to the necessity of applying to them for loans, and might possibly even obtain a majority in the

[1] Anderson, 285.
[2] Tindal, vol. 4, book 27.
[3] Anderson, 250.
[4] Coxe, 184.

House of Commons, and make and depose ministers at pleasure.[1]

The artifices which were thus resorted to to support the credit of the South Sea adventurers were attended for a short time with almost incredible success. Even then, however, says a judicious historian, there happened such sudden fluctuations in their stock, sometimes even in the space of a few hours, as might have given clear indications of its precarious value, notwithstanding the various acts daily practiced to keep it constantly rising.[2] But the immediate cause of the company's destruction is well known. The thirst for speculation was not confined to the proprietors of the South Sea scheme. The whole nation had become adventurers, and every day produced new commercial companies, some for useful, others for most chimerical purposes; some founded on obsolete charters, and others, the most numerous, not affecting the least authority of that nature.[3] The South Sea Company became jealous of these societies, which they denominated bubbles, and being desirous to monopolize all the money of the speculators, obtained writs of *scire facias*,[4] against the conductors, and thus put an end to them. But, observes another historian, in opening the eyes of the deluded multitude they took away the main prop of their own tottering edifice. Suspicion once excited was not to be suppressed, and the public, no longer amused by pompous declarations and promises of dividends, which they were convinced could never be realized, declined all further purchases of stock; and those who had bought at large premiums were involved in distress and ruin. Amongst the numbers who suffered by these speculations were not only persons of the first rank, but merchants and traders of every class, and bankers, who having advanced the moneys committed to them on the subscription receipts, by their temporary stoppages augmented the general calamity.[5]

Later acts.

SEC. 827. We have entered thus minutely into the history of the South Sea Company in order to show more clearly under what circumstances the famous bubble act originated. It has just been

[1] Id. and see Anderson, 287.

[2] Anderson, 287.

[3] Id. 288. Tindal, Vol. 4, book 27. In Anderson, several hundred of these speculations are enumerated. The recent bubble years were equally productive. At the end of 1825 the number of the various companies (calculating for the two years, 1824 and 1825) may be stated thus: established, 127; abandoned, 118; projected, 379; total, 624. See a Complete View of the Joint-Stock Companies, by H. English. London, 1827. Boosey & Sons.

[4] 5 Bro. P. C. 492; 2 P. W. 217.

[5] Coxe, 135.

observed that the South Sea Company, conscious of their own weakness, caused writs of *scire facias* to be issued against the minor bubbles. But this took place a few months after the passing of the act in question, and because the provisions of that act and of the proclamation which accompanied it, had not been fully obeyed. It may, therefore, be fairly conjectured that the bubble act itself was passed at the instigation of the South Sea Company, and was, therefore, a mere machine for propping up the credit of that company; consequently, that it was made with no real view to the interests of trade in general, and is not to be considered, so far as the intentions of the framers were concerned, as declaratory of the common law in regard to mercantile companies.

The act (6 Geo. 1, c. 18, s. 18) reciting that "whereas it is notorious that several undertakings or projects of different kinds have at times, since June, 1718, been publicly contrived and practiced or attempted to be practiced within London and other parts of the kingdom, as also in Ireland and other dominions of the King, which manifestly tend to the common grievance, prejudice, and inconvenience of great numbers of subjects in their trade or commerce, or other their affairs; and the persons who contrive or attempt such dangerous and mischievous undertakings or projects, under false pretenses of public good, do presume, according to their own devices and schemes, to open books for public subscriptions, and draw in many unwary persons to subscribe therein, toward raising great sums of money; whereupon the subscribers or claimants under them do pay large proportions thereof, etc., which dangerous and mischievous projects relate to several fisheries and other affairs, wherein the trade, commerce and welfare of the subjects, or great numbers of them, are interested. And whereas, in many cases, the said undertakers or subscribers have presumed to act as if they were corporate bodies, and have pretended to make their shares transferable or assignable, without any legal authority," etc. (Then, after stating some instances of illegal acting under obsolete or pretended charters)—"And many other unwarrantable practices, too many to enumerate, have been and may hereafter be contrived, set on foot, or proceeded upon, to the ruin of many subjects, etc. And whereas it is absolutely necessary that all public undertakings and attempts, tending to the common grievance, prejudice, and inconvenience of the subjects in general, or great numbers of them, in their trade, commerce or other lawful affairs, be effectually suppressed," etc., for remedy

enacts "that all and every the undertakings and attempts described as aforesaid, and all other public undertakings and attempts tending to the common grievance, prejudice and inconvenience of his Majesty's subjects, or great numbers of them, in their trade, commerce or other lawful affairs, and all public subscriptions, receipts, payments, assignments, transfers, pretended assignments and transfers, and all other matters and things whatsoever, for furthering, countenancing, or proceeding in any such undertaking or attempt, and more particularly the acting or presuming to act as a corporate body, the raising or pretending to raise transferable stock, transferring or pretending to transfer or assign any share in such stock, without legal authority, etc., shall be deemed illegal and void." Section 19 enacts that "all such unlawful undertakings and attempts, so tending to the common grievance, etc., shall be deemed public nuisances, and subject the offenders to the penalties of *præmunire*, in addition to the fines, penalties and punishments of persons convicted of common and public nuisances." And a subsequent clause gives other remedies in respect of these grievances, with a proviso (s. 25) that the act shall not be construed to prohibit or restrain the carrying on of partnerships in trade, in such manner as has been before usually and may legally be done.

The supposition which has been hazarded as to the primary motive for passing this act is not weakened by the circumstance that, from the time of Lord Raymond to the time of Lord Ellenborough, no proceeding upon it appears to have taken place. About two years after the statute was passed, a person was found guilty on an information under the act, "for setting up a bubble called the North Sea." The court declined giving the whole judgment, as in a case of *præmunire*, against him, but sentenced him to a fine of 5*l*., and imprisonment during the King's pleasure.[1] From the time when this case was decided till the year 1808, an interval of about eighty-seven years, the statute appears to have been forgotten; but, in the year just mentioned, a criminal information was moved for against the framer and proprietor of a trading scheme, on the ground that it was expressly against the provisions and policy of the statute.[2] Afterward, several other cases of the same kind occurred before Lord Ellenborough and other judges, all of which are well known and have been frequently discussed.[3]

---

[1] Rex v. Cawood, 2 Ld. Raym. 1361. Rex v. Stratton, id. 549, n.; Pratt v. Hutchinson, 15 East, 511. See, also,
[2] Rex v. Dodd, 9 East, 516.
[3] See Buck v. Buck, 1 Camp. 547; Brown v. Holt, 4 Taunt. 587.

Repeal of the statutes, and the consequences.

SEC. 828. The statute having been repealed, it will be unnecessary to state those cases at length, yet it seems necessary to notice shortly the manner in which the act has been construed, because it has been said that the offenses there mentioned are likewise offenses at the common law.

The offenses which are more particulary pointed out by the statute are, the presuming to act as a corporate body; the raising transferable stock; the transferring such stock. One would have supposed, from the wording of the statute, that, in order to complete these offenses, they must have been committed for furthering some dangerous and mischievous undertaking, to the common grievance of the public, for the act says that all such undertakings, etc., "and all other matters and things for furthering such undertaking, and more particularly the acting or presuming to act as a corporate body, the raising or pretending to raise transferable stock, etc., shall be deemed illegal and void," the latter proceedings being mentioned only as particular instances of acts done in furtherance of such undertakings. And in The King v. Webb, Lord Ellenborough seems to have been of that opinion. "It may admit of doubt," said his Lordship, "whether the mere raising transferable stock is, in any case, *per se* an offense against the act unless it had some relation to some undertaking or project, which has a tendency to the common grievance, prejudice, or inconvenience of his Majesty's subjects, or of great numbers of them." And the whole of his Lordship's judgment in that case is in accordance with the opinion conveyed in this *dictum*. In later cases, however, it has been considered that the act intended to denounce all societies acting as corporate bodies, or raising transferable stock, and that proceedings of that nature must be held to render the body a common grievance within the meaning of the act, whether it be or be not mischievous in its avowed object and general tendency.[1]

With regard to the specific offenses mentioned by the act, it seems to have been universally agreed that the acting as a corporate body is an offense very difficult to be defined. It may perhaps be inferred from other parts of the statute, that this enactment was directed against persons who pretended to be in possession of some charter of incorporation, and not against every species of society. But however this may be, it seems to be unquestionable that there are particular

[1] Josephs v. Pebrer, 3 Barn. & Cres. 884; Ellison v. Bignold, 2 Jac. & Walk. 639; 5 Dowl. & Ryl. 542; Duvergier v. Fellowes, 5 Bing. 248; 2 Moore & Payne, 503.

offenses of this nature for which an indictment will lie, not only under the statute, but even at common law. It is apprehended, however, that the more general charge of acting as a corporation would not be sufficient to support an indictment at common law, but that there must be additional averments, stating with particularity the nature of the offense. It is conceived, that the opinion on this subject, reported to have been expressed by Lord Eldon,[1] must be received with this limitation.

As to the particular offenses alluded to, it seems more easy to say what is not, than what is an act of assuming a corporate capacity. It is clear that the assuming a common name for the purpose of designating the society, the using a common seal, and making regulations by means of committees, boards of directors, or general meetings, were not illegal within the statute, and are not illegal at common law. In The King v. Webb, Lord Ellenborough said—"As to the fourth point, that the subscribers have presumed to act as though they were a body corporate, how is this made out? It was urged that they assumed a common name (which, however, does not appear to have been the case), that they have a committee, general meetings, and power to make by-laws; but are these the unequivocal *indicia* and characteristics of a corporation? How many unincorporated insurance companies, and other descriptions of persons are there, that use their common name, and have their committees, general meetings, and by-laws? Are these all illegal, or which of these particulars can be stated, as being of itself the distinctive and peculiar criterion of a corporation?" So, in the case of Ellison v. Bignold,[2] where it appeared that the directors of an insurance company had, by their deed of settlement, the power of making orders and by-laws, and that a seal was to be fixed upon for the use of the company, it was urged that this amounted to an assumption of a corporate character; but Lord Eldon appears to have taken no notice of this objection, and to have considered the legality of the association as depending entirely on the manner in which the shares were made transferable. In addition to these authorities we may add that the numerous acts of Par-

[1] In Kinder v. Taylor, see Index. See, also, McCallum v. Turton, 2 Younge & Jerv. 183.

[2] 2 Jac. & Walk. 503, and see Pearse v. Piper, 17 Ves. 1; Carlen v. Drury, 1 Ves. & Bea. 157. But Lord Eldon's opinions in these cases seem to have been guided by his own notion of the utility or inutility of each association as they passed in review before him. He seems to have considered, that the mischievous tendency of the associations was a question for the judge and not for the jury. See Kinder v. Taylor, *post;* Lloyd v. Loaring, 6 Ves. 773.

liament for enabling certain companies to sue and be sued by their secretary seem to assume the legal existence of the various powers of which we have just been speaking.

Who are to be treated as usurping powers of a corporation.

SEC. 829. It seems clear, therefore, that whether we view this subject with reference to the repealed statute, or the existing common law, they alone are to be considered as assuming to act as a corporate body, who usurp the "unequivocal *indicia* and characteristics which form the distinctive and peculiar criterion of a corporation." It is not to be doubted, however, that they who are parties to proceedings of this nature are guilty of an offense in law. Thus, corporate bodies alone can use a common name for the purpose of suing, contracting, conveying, or accepting conveyances; and to affect the use of a common name for these purposes would, perhaps, in every case, be contrary to law. Again, corporate bodies have the power of binding their members by the acts resolved upon in the manner prescribed by their charters, which power they derive from their corporate character, and not from contract and agreement between themselves;[1] on the other hand, voluntary associations are governed entirely by the rules which the parties have themselves agreed to. Hence, if the committees or meetings of an unincorporated society were to assume to exercise, independently of any contract or agreement for that purpose, a general power of binding their members, it might reasonably be contended that such an act was illegal and indictable. The only acts, however, which have been expressly decided to be an assuming to act as a corporation, are, first, that of making the shares transferable, without any restriction, at the mere will of the holder, and, secondly, holding out to the public that the shares are so transferable.

That the first of these acts is illegal at common law seems to be a fair conclusion from the case of Josephs v. Pebrer,[2] in which, notwithstanding Lord Ellenborough's doubts before adverted to, it was held that the making shares generally assignable was illegal, not only under the words of the statute on that particular point, but with reference to the more general offense of acting as a corporation; and the observations of Best, C. J., in a subsequent case, are confirmatory of this opinion. "There can be no transferable share of any stock, except the stock of corporations, or of joint-stock companies created

[1] See Adley v. Whitstaple Company, 17 Ves. 315.

[2] 3 Barn. & Cres. 639; 5 Dowl. & Ryl. 542.

by acts of Parliament. Indeed, the members of corporations cannot assign their interest, and force their assignees into the corporation, without the authority of an act of Parliament. Such authority is expressly given by the bank acts, the South Sea acts, and by other statutes, creating companies that possessed stock, which it was deemed proper to render transferable. The pretending to be possessed of transferable stock is pretending to act as a corporation, and pretending to possess a privilege which does not belong to many corporations.[1]

In the late case of Blundell v. Winsor,[2] Sir Lancelot Shadwell held an association to be illegal at common law upon both the grounds above stated. In that case the company was established for working gold mines in America, and by the deed of settlement it was stipulated that it should be lawful for the shareholders, at a meeting to be called for that purpose, at any time, and from time to time, to increase the capital to any amount that might be agreed upon by creating an additional number of shares; and further, that "the shares, as well original as additional, should and might be assigned and disposed of by deed or will or otherwise to any other person or persons at the discretion of the holders thereof." The bill having been filed by one of the shareholders against the others for a dissolution and general settlement of the affairs of the concern, and one of the defendants having demurred generally for want of equity, Sir Lancelot Shadwell allowed the demurrer, observing that the fair inference to be drawn from the deed was that certain persons were to form a company which might be increased to an unlimited extent, with power to the shareholders to transfer their shares to whomsoever they pleased, without any sort of control; in other words, the deed represented that the persons who should assign their shares would get rid of all the liabilities attached to them, and that the persons who should take their shares would take them just as the assignors held them. This, his honor said, could not be done; and his notion was that the deed was illegal, not only because it trenched on the prerogative of the King by attempting to create a body who without the protection of the King's charter might assign their shares without any restriction, but because it held out to the public a false and fraudulent representation that the shares could be so assigned; and his honor allowed the demurrer with costs.

The second reason here given for the allowance of the demurrer is well worthy of consideration, inasmuch as it is inconsistent with

[1] 5 Bing. 267.
[2] 8 Sim. 601.

the opinion of Lord Brougham in the previous case of Walburn v. Ingleby,[1] in which his Lordship, in referring to the prospectus of the company engaged in that suit, said that a certain clause intimating that each subscriber was only to be liable to the extent of his share was not enough to make the association illegal, but was merely nugatory as between the company and strangers, and that whoever became a subscriber upon the faith of the restricting clause, or of the limited responsibility which that held out, would have himself to blame and be the victim of his ignorance of the known law of the land.

Without attempting to judge of the respective merits of these conflicting opinions, it may be observed that in the case before Lord Brougham the prospectus did not go to the length of stating that the liability of the shareholders was restricted to the amount of their own shares, but only that provision was to be contained in all engagements to be entered into by the directors in behalf of the association, "that no shareholder should be subject or liable beyond the amount of his share or shares."

Test of legality as to joint-stock companies.

SEC. 830. Where the shares are not transferable at the mere unrestricted option of the holder, the association, as far as relates to that matter, will be legal. In the case of The King v. Webb, which has been so often referred to, the shares could not be transferred to any person who would not enter into the original covenants; nor could more than twenty be held by the same person, unless they came to him by operation of law, and the object of the society which was to supply the inhabitants of Birmingham, being shareholders, with bread and flour, virtually limited the transfer of shares to persons residing in the neighborhood. And the Court of King's Bench gladly availed themselves of these circumstances in order to hold the association legal. So, in Pratt v. Hutchinson,[2] which was the case of a building company, no person could become a member of the company until he had made himself a party to the partnership articles, nor until he had been proposed and approved by a certain majority of persons present at the meeting of the society. And the court held that these restrictions on the transfer of the shares preserved the legality of the association. And, perhaps, these restrictions might be still further relaxed in cases where it can be shown, as in The King v. Webb, that the object of the undertaking was not to raise stock for the purposes

[1] 1 Myl. & K. 61. Hawkins, 3 Man. & Selw. 488.
[2] 15 East, 511; and see Davies v.

of transfer, nor to make such stock a subject of commercial speculation or adventure.

Upon the whole it may be laid down generally that all trading associations, however numerous, and although unsupported by charter or act of Parliament, are legal, provided their purposes and their mode of dealing are honest, and consistent with the general policy of the country, and provided they usurp none of the exclusive privileges of a corporation, but in order to render the rights of public companies definite, the majority of them are invested with general or special privileges under various acts of Parliament. These will be shortly noticed in a subsequent chapter.

What makes a man a partner in a joint-stock company.

SEC. 831. As the law in England makes every member of a joint-stock company liable *in solido* for debts contracted on account of the copartnership, it will be necessary to consider accurately what makes a man a partner in such a company, both as between himself and the other shareholders, and also as regards the world in general. For, in order to charge a person as a partner, it must be shown either that he was an actual partner and as such entitled to share the profits and liable to contribute to the losses, or that he held himself out to the world as a partner and thereby gave the company the credit of his name.[1]

What constitutes an actual partner in a company.

SEC. 832. In joint-stock companies, more than in any other kind of partnership, a variety of acts are done before the partnership is actually commenced. Notices are published, prospectuses are distributed, meetings are held, officers are chosen, deposits are paid, and scrip receipts are given long before the business is commenced, or the deed of settlement is executed. Indeed, many of these acts are necessarily done before even the full complement of the intended shareholders is made up. Hence, although the prime movers and agitators of the scheme will undoubtedly be liable in respect of the contracts into which they enter for the purpose of launching the company, yet they cannot by such proceeding bind those who merely answer their invitation; those, for instance, who name themselves subscribers, and even pay deposits, and do other acts showing an intention of becoming partners, but who, by neglecting to observe the rules, or to comply with the demands of the society, never become entitled to share the profits. The contract of

[1] Per Lord Tenterden, 9 Barn. & Cres. 638.

partnership, as regards these passive subscribers, is executory only, and may be abandoned, if the terms of the partnership are not reasonably fulfilled by the projectors. Under such circumstances, they never have become actual partners in the concern, and, consequently, have never rendered themselves liable for its debts. In the language of a learned judge:—"If there is a contract to carry on business by way of present partnership between a certain definite number of persons, and the terms of that contract are unconditional or complete, then the partners give to each other an implied authority to bind the rest to a certain extent. But if a person agree to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individual, until all those contracts are performed. If any of the other intended partners in the mean time enter into contracts, it seems to me to be clear that he is not bound by them, on the simple ground that he has never authorized them."[1]

The law upon this subject is ably expounded by Lord Chief Justice Tindal in the case of Fox v. Clifton,[2] the facts of which were as fol-

[1] D. Parke, J., 10 Barn. & Cres. 142. See Howell v. Brodie, *ante*.

[2] 6 Bing. 776; 4 Moore & Payne, 712; 9 Bing. 115. At the common law partnerships are sometimes divided, among other divisions, into these kinds: 1, private partnerships, which are composed of two or more partners for some merely private undertaking, trade, or business; and 2, public companies, where a large number of persons are concerned, and the stock is divided into a large number of shares, the object of the undertaking being of an important nature and often embracing public as well as private interests and benefits. The latter are also subdivided: 1, into unincorporated companies or associations; and, 2, into incorporated companies and corporations existing under a charter of the government, and having special powers and rights conferred thereby. In both cases, however, the partnership, although called a public company or association, is not, in contemplation of law, more than a mere private partnership; for in the sense of the law no company is a public company or association whose interests do not exclusively belong to the public and are not exclusively subject to the regulation and government of the legislature or other proper public functionaries. Thus, for example, a college, a bank, a bridge company, a manufacturing company, a company for mining, or foreign trade or commerce, whether incorporated or not, is still but a mere private association. Whereas, a town, a parish, a hundred, a board of trade, or a treasury department created by the government for public purposes and exclusively regulated thereby, would be strictly a public company, whether incorporated or not. Unincorporated companies and associations differ in no material respect as to their general powers, rights, duties, interests, and responsibilities, from merely private partnerships, unless otherwise expressly provided for by statute, except that the business thereof is usually carried on by directors or trustees, or other officers, acting for the proprietors or shareholders, and they usually extend to some enterprise in which the public have an ultimate concern. But incorporated companies or corporations are governed strictly as to their powers, rights, duties, interests, and responsibilities, by the terms of their respective charters, and the shareholders, or stockholders, are not personally or individually liable in their private capacities, unless expressly so declared by their charters, for the acts, or doings, or contracts of the officers or members of the company or corpora-

lows:—Certain persons met together in March, 1825, and resolved that a company should be formed, to be called "The Imperial Distillery Company." After a preliminary announcement of their inten-

tion; whereas in unincorporated companies or associations the shareholders and stockholders are personally responsible in their individual capacities for all acts of the officers and company, or association, in the same manner and to the same extent as private partners are." Story on Part., pp. 107–109; Babb v. Read, 5 Rawle (Penn.), 157; Tappan v. Bailey, 4 Metc. (Mass.) 535; Cox v. Badfish, 35 Me. 302; Henry v. Jackson, 37 Vt. 431; Gorman v. Russell, 18 Cal. 688; Williams v. The Bank of Michigan, 7 Wend. (N. Y.) 542; Tenney v. The N. E. Protec. Union, 37 Vt. 64; Robbins v. Butler, 24 Ill. 387; Penn. Ins. Co. v. Murphy, 5 Minn. 36; Irvine v. Forbes, 11 Barb. (N. Y.) 588; Pipe v. Bateman, 1 Iowa, 369; Skinner v. Dayton, 19 Johns. (N. Y.) 537.

In joint stock and other large companies which are not incorporated, but are a simple, although an extensive partnership, their liabilities to third persons are generally governed by the same rules and principles which regulate common commercial partnerships. How far any stipulation in the articles of such companies, which limit the responsibility of the members to the mere joint funds, or to a qualified extent, will be binding upon their creditors, who have notice of such stipulation, and contract their debts with reference thereto, Justice Story deemed an open question, so far as judicial decisions go, though his opinion seems to be that creditors, with such notice, cannot proceed against the members upon their general responsibility as partners where they have expressly contracted to look to the social funds; and that, if they have notice of the qualifying stipulation and contract with reference to it, they are bound by it as much as if it were expressly agreed to. Story on Part., pp. 254–255. See cases cited, *ante*.

Semble, that subscribers, as for building a meeting-house, are partners *quoad hoc*, so that one cannot recover against the others, or such as act as the building committee, for services performed. Cheeny v. Clark, 3 Vt. 431.

If an individual enter into contract with a company transacting business under articles of association, one of which provides for an application to the legislature for a charter, which is afterward granted, the style and general organization of the association continuing the same, and nothing is performed under the contract until after the charter was granted, the company are responsible as partners, notwithstanding the act of incorporation declares that all contracts made by the association shall be as obligatory on the same and on other parties thereto as if they had been made subsequently to the act of incorporation, and that it shall be lawful for the corporation and such parties to maintain actions to enforce the performance thereof as effectually as if the same had been made by or with the corporation. Witmer v. Schlatter, 2 Rawle (Penn.), 359. The private association of stockholders of the North River Steamboat Company is not a copartnership, but the parties are tenants in common of the property and franchises belonging to the company. And in such association the majority cannot bind the minority, unless by special agreement. Livingston v. Lynch, 4 Johns. Ch. (N.Y.) 573.

An association for mutual benevolence among its members only is not an association for charitable uses under the common law of Pennsylvania or the stat. of 43 Eliz. Baab v. Reed, 5 Rawle (Penn.), 151. Its members, if not incorporated, are considered as partners in their relations to third persons, and the property of the association must be applied to pay the debts of the association before it can be appropriated to the payment of the claims of those who are members. Id.

Articles of association.—The doctrine of the common law, as to the right of a majority to govern in all cases where the stipulations of the articles of the partnership do not import the contrary, must be strictly confined to acts done within the scope of the business of the partnership, and does not extend to the right to change any of the articles thereof. In such a change it is essential that all should unite, otherwise it is not obligatory upon them. This is emphatically true in cases of joint associations and joint-stock companies of an extensive nature, in the constitution of which certain articles are treated as fundamental, and cannot be altered or varied without the consent of all the

tion by advertisement, a meeting was held, and a further advertisement appeared, as follows:—"Imperial Distillery Company, capital 600,000*l.*, 12.000 shares, at 50*l.* each." (After a list of names of trus-

members, for the rule which applies to public bodies, strictly so called, that the majority shall govern in all cases, is inapplicable to private associations where the terms originally subscribed for the association must and ought to remain in full force until abrogated by the consent of all the associates. Story on Part. 186-7.

It is now well settled, that in matters of mere private confidence, or personal trust or benefit, the majority cannot conclude the minority. Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573-579; Green v. Miller, 6 Johns. (N. Y.) 39.

Resolutions which were passed at a meeting of the stockholders of an association by unanimous vote and subscribed by all of them, and which were thereby constituted the fundamental articles of the association, cannot be altered but by the unanimous voice of all the stockholders. Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573.

Where a joint-stock company was formed for the purpose of effecting fire and life insurance, it could not, without the consent of all the shareholders, be extended to marine insurances. With respect to the nature, extent, and kind of business of a partnership, as stated in the articles, courts of equity construe the articles strictly, and do not permit the business to be extended by any of the partners without the consent of all of them, either express or implied, to any other business or branch of business of a different nature, extent, or kind, and if it is attempted they will interpose by way of injunction to restrain the offending parties. Story on Part. 290-1; 2 Story on Eq. Juris. 618.

What constitutes a person a partner in such a company.—Where, previous to the formation of a company, a prospectus, signed by the defendant, was issued, indicating that it was in contemplation to form the company, and the defendant solicited others to become shareholders, and was present at a meeting of the subscribers, when it was proposed to take certain premises to carry on the business of the concern, which were afterward taken, but he never paid his subscription, it was held that the defendant was not chargeable as a partner for goods supplied to the company, for he did not hold himself out to the world as a partner in a company already formed, but to one which was to be, or might thereafter be formed. It would have been otherwise if he had held himself out as a partner in a company already formed, or had contributed to its funds, or had been present at a meeting of the company, and a party to a resolution to purchase goods. Story on Part. 234-5.

Transfer of shares.—The articles of partnership of a distillery company provided that a partner might assign his share by a certificate in writing, which being lodged with the clerk of the company, should entitle the assignee to all the privileges and subject him to all the liabilities of a partner. It was held that a valid assignment might be made without such certificate, notwithstanding the articles. Alvord v. Smith, 5 Pick. (Mass.) 232. Where a joint-stock company, for the purpose of running stage-coaches, issued to its members certificates of their shares in the joint stock, containing a provision that the shares should not be transferred without the consent of the directors and treasurer, and the plaintiff, to whom a share had been assigned without such consent, brought a bill in equity to compel the company to account, alleging himself to be a partner, it was held tha he was not a partner but only a tenant in common, and the bill was dismissed. Kingman v. Spurr, 7 Pick. (Mass.) 235. A stockholder may transfer his interest to a purchaser, though the transfer be not made conformably to the rules and by-laws of the corporation. Gilbert v. Manchester Iron Manufacturing Co., 11 Wend. (N. Y.) 627; Quinner v. Marblehead Social Ins. Co., 10 Mass. 476; Sergeant v. Essex Marine Railway, 9 Pick. (Mass.) 204.

Liability of shareholders.—By articles of agreement between the members of an insurance company, each member covenanted for himself, severally and not jointly, that the policies should be binding on all the members in proportion to the sums subscribed by them respectively; but there were no negative words that they should not be liable for more in case of the insolvency of some of the members. Several of the members afterward became insolvent. It was

tees, directors, auditors, etc., it proceeded thus):—"The affairs of the company are under the management of a board of directors; the capital is 600,000*l.*, in 12,000 shares, at 50*l.* each. A deed of settle-

held that the members were liable as partners to pay any loss, not only as to strangers but also to any member of the company who had procured insurance to be effected by such company, but that, in the latter case, his proportion of the losses occasioned by the insolvency of the members was to be deducted from the amount to be paid to such members. Shubrick v. Fisher, 2 Desaus. (S. C.) 148. Notwithstanding that the terms of the promise of a note issued by an unincorporated banking association are to pay "out of their joint funds, according to their articles of association," yet the members are liable in their separate estates. Hess v. Werts, 4 S. & R. (Penn.) 356. Where a charter renders stockholders individually liable for all debts contracted by the company to the nominal amount of stock held by them, one who subscribes for a certain number of shares is liable for the company debts to the nominal amount of those shares, though he has paid no part of his subscription, nor done any act as a stockholder. Spear v. Crawford, 14 Wend. (N. Y.) 20. Where an act of incorporation provided that "the persons and property of the members of the corporation should at all times be liable for all debts by said corporation," it was held that the members were liable in an original manner as if no such corporation existed, and, therefore, no *scire facias* could be maintained against them on a judgment against the corporation. Southmayd v. Russ, 3 Conn. 52.

In Bourne v. Freeth, 9 B. & C. 632, it being in contemplation to form a company for distilling whisky, the following prospectus was issued in May, 1825: "The conditions upon which this establishment is formed are—the concern will be divided into twenty shares of 100*l.* each, five of which belong to A B, the founder of the works; the other fifteen subscribers to pay in their subscriptions to M. & Co., bankers, Liverpool, in such proportions as may be called for. The concern to be under the management of a committee of three of the subscribers, to be chosen annually on the 10th of October; ten per cent to be paid into the bank on or before the first of June next." It was held that this prospectus imported only that a company was to be formed, not that it was actually formed, and that a person who subscribed his name to this prospectus and who was present at a meeting of subscribers when it was proposed to take certain premises for the purpose of carrying on the distillery, which were afterward taken, and solicited others to become shareholders, but never paid his subscription, was not chargeable as a partner for goods supplied to the company.

In Pitchford v. Davis, 5 M. & W. 2, a project having been formed for the establishment of a company for the manufacture of sugar from beet-root, a prospectus was issued stating the proposed capital to consist of 10,000 shares of 25*l.* each. The directors began their works, and entered into contracts respecting them, and manufactured and sold some sugar; but only a small portion of the proposed capital was raised, and only 1,400 out of the 10,000 shares were taken. It was held that a subscriber who had taken shares and paid a deposit on them was not liable upon such contracts of the directors without proof that he knew and assented to their proceeding on the smaller capital, or expressly authorized the making of the contract.

But it will be different if there is evidence to show that the subscriber expressly authorized the directors to proceed with the smaller amount of capital. Thus, where a mining company was formed, the capital to be 30,000*l.*, in 300 shares of 10*l.* each; and 2,000 shares only were actually subscribed for, of which the defendant took 100, it was held that letters subsequently written by the defendant to the directors, requiring them to call a meeting for the purpose of changing a director, were evidence to go to the jury to show that he authorized the directors to proceed in the management of the concern with the smaller amount of capital, so as to render him liable for the price of articles supplied for the use of the mines, on the order of the directors. Tredwen v. Bourne, 6 Mees. & W. 461; 4 Jur. 747.

The result of these cases is, that in a scheme for a company which has not advanced to completion, that is, which has not arrived at the point held out by the promoters or provisional directors to the subscribers as the starting point, which point may be stated to be com-

ment will be prepared forthwith, which must be executed within thirty days after the same shall be ready for that purpose ; and every person who shall neglect to execute the same within that time will forfeit all share and interest in the company. The deed is to contain all such clauses and conditions as the standing counsel and solicitors to the company shall deem necessary for carrying on the business of the company, and for enforcing the observance and performance of the several rules and regulations to be contained therein, or in any by-law that shall be from time to time made by the directors. Application is intended to be made to Parliament for an act to enable the company to sue and be sued in the name of one of its officers; and the said deed of settlement, when settled and approved by the standing counsel and solicitors, and the act of Parliament, when passed, shall be the deed of settlement and act of Parliament for managing the affairs of this company. The shares will be forthwith allotted, and until offices are taken, all communications are requested to be

---

plete registration and incorporation respectively, there is no partnership existing *quoad* strangers; and, therefore, that the subscribers or allottees are not liable for debts incurred to strangers in the name of the company, merely *qua* subscribers or allottees, where they have not expressly authorized the directors to proceed with the smaller or incomplete subscription or capital, and where they have not in any way held themselves out as personally responsible. The case of Woolmer v. Toby, heard before Rolfe, B., at Exeter, cannot be said to have in the least shaken the above conclusion. When reference was made to it in the Court of Exchequer in Easter Term, Rolfe, B., said, "Woolmer v. Toby can hardly be said to have been tried at all. In one sense of the word it no doubt was tried; but nothing at all was decided in it." 10 Jur. 319.

But where there is no partnership *quoad* strangers, there is necessarily none *inter se*, since, as has been shown, there cannot be a partnership *inter se* without one *quoad* strangers, though there may be one *quoad* strangers without there being one *inter se*. The result of the cases fully agrees with this, and establishes that there is here no partnership existing either *quoad* strangers or *inter se*, together with all the consequences of that proposition, one of which is the non-liability of the subscribers or allottees; another, the liability of the promoters or provisional directors both to the subscribers or allottees and to strangers. In cases of goods supplied, or work and labor done, or services performed, for persons who are about engaging in a joint undertaking, and are taking preliminary steps for establishing the same, the joint liabilities will, of course, commence only from the time when the parties have agreed to act together for the common purpose. There is a gradual progress even in the formation of schemes of this nature, and preliminary acts are sometimes done, and orders given by several persons, before they have absolutely fixed upon being concerned in the joint undertaking; and yet it rests in negotiation whether they shall or shall not become partners. In such cases the question resolves itself, ultimately, rather into a question of fact than of law; and until the partnership is definitely fixed and agreed on, those only are liable who have acted and ordered the materials, or work, or labor, or services. Story on Part. 282–4.

Subscribers for stock, who sign an agreement, after the passing of an act of incorporation, to pay all legal assessments that may be made after the corporation shall be organized, are personally liable for an assessment laid to defray the preliminary expenses incurred in obtaining such act, though the company was not authorized at the time of laying such assessment to lay them. Salem, etc., Co. v. Ropes, 6 Pick. (Mass.) 23; Centl. T. Co. v. Valentine, 10 id. 147.

made to the directors, at the City of London Tavern. (Signed, W. Lane, Sec.)" On the 23d of March, a meeting was held, at which 7,000 shares were appropriated. A few days after, the defendants, seven in number, paid their deposits, and took their scrip receipts. On the 4th and 16th days of July, notices were given of a call for a second installment, and, on the 25th of the same month, a letter was sent by the secretary to the subscribers, stating that the deed of settlement awaited their signature, "and unless the same be signed, and the second installment of 5*l.* per share paid immediately, the shares unpaid for will be forfeited. In August, an advertisement appeared, declaring that deposits on the outstanding scrip were forfeited. In the latter end of the year, a third call was made by the directors. Of the seven defendants, four neglected to pay the second and third installment, two paid the second and neglected to pay the third, the other paid all the installments and signed the deed. None of them interfered in the affairs of the concern. The speculation ultimately failed. The contract, which was the subject of the action, was entered into by the directors with the plaintiff on the 18th of July, and the work done in pursuance of the contract was done between the 2d of August and the 13th of July, in the following year.

On the argument of this case before the Court of Common Pleas, one question was, whether the defendants were liable for the price of the work on the ground of being actual partners in the concern, and the court held that they were not. Tindal, C. J., in delivering the judgment of the court, said: "The question is whether at the time of this contract made by the directors the relation between the defendants and them was such that the directors were constituted the agents of the defendants to bind them by their contracts. Now, the advertisement describes the proposed undertaking as 'The Imperial Distillery Company.' It is said, this description assumes that it is a company already formed, but the very circumstance of publishing an advertisement proves that it was only a project for a company, not a company actually formed, for, if the 600,000*l.* had been subscribed, and the 12,000 shares allotted, why publish an advertisement? It could only be intended for the purpose of inducing others to subscribe. Now, this advertisement is the basis of the contract between the parties; it is upon the footing of this prospectus, that the seven defendants had their shares allotted to them, and paid their deposits, if they are not partners under this agreement, they are not partners

under any, for they neither exchanged their scrip-receipts or certificates of shares, nor executed the deed when prepared, nor paid a second call when made, nor appeared at any meeting, nor interfered with any concerns of the company, nor did any act subsequent to the making this contract, nor any act before, other than applying for shares and paying the deposit of 5*l.* *per* share, when they learned, from the letter of the secretary, that a certain number of shares was appropriated to them. The paying of the deposits must undoubtedly be taken to imply an assent to the terms of the advertisement, that is, an assent to become partners in a company, raising a capital of 600,000*l.*, consisting of 12,000 shares, and to be governed by a deed which should contain the clauses and conditions to be agreed on in future; but we think it implies nothing more, and that it cannot be construed as an assent to the terms of the partnership already formed. When, therefore, instead of an allotment of 12,000 shares, the utmost that were ever allotted scarcely exceeded 7,500; when, out of that number, no more than 2,300 ever paid the first installment; when not half the latter number paid the second installment, and only sixty-five subscribers signed the deed — we think the subscribers were at liberty to say: This was not the trading company upon which we paid our deposit, neither the capital, nor the number of shares, bearing any reasonable proportion to the original plan and project."

Another important case upon this subject is that of Pitchford v. Davis,[1] which was an action for goods sold and delivered, etc. At the trial before Lord Abinger, C. B., it appeared that in the early part of the year 1836 a project was formed for the establishment of a company under the name of "The United Kingdom Beet-root Sugar Association," and prospectuses were issued, stating the proposed capital to be in 10,000 shares of 25*l.* each, and the names of the directors were announced. In the month of April in that year, the defendant applied for shares, which were accordingly allotted to him, and he paid the deposit on them in June following. In the course of the summer the company commenced building their works with the defendant's knowledge, and, shortly afterward, a call was declared and paid. The goods for which the action was brought consisted of certain quantities of charcoal and lump alum, which were supplied by the plaintiffs to the directors, on the order of the secretary, for the use of the company, in December, 1836, and January, 1837; and in 1837, sugar, to the value of 500*l.*, had been made and sold. The defend-

[1] 5 Mees. & Wels. 2.

ant was not shown to have interfered in the management of the concern, but he was proved to have been on one occasion at the manufactory, and to have said that he understood the nature of the works, and the mode of manufacturing sugar. The plaintiffs' counsel contended that, under these circumstances, the defendant was a partner in a trading company, and a part owner of the goods supplied, and as such was liable in this action. It was proved on cross-examination of the plaintiff's witnesses that only a small part of the proposed capital had been raised, and that not more than 1,400 out of the 10,000 shares had been taken. The Lord Chief Baron told the jury that without evidence that the defendant knew and assented to the works being carried on with a smaller capital than that which was originally proposed, he could not be bound by the contract of the directors; and it was for them to say whether the works were so carried on with his knowledge and consent. The jury having, under this direction, found a verdict for the defendant, a motion was made for a new trial, but the Court of Exchequer refused the application. Lord Abinger, C. B., "The question is, whether the directors were the agents of the defendant in carrying on the business with so small a capital. I thought at the trial, and am still of the same opinion, that, where a prospectus is issued, and shares collected for a speculation to be carried on by means of a certain capital, to be raised in a certain number of shares, a subscriber is not liable in the first instance, unless the terms of the prospectus in that respect are fulfilled. But if it be shown that he knows that the directors are carrying on the undertaking with a less capital, and has acquiesced in their so doing, he may become answerable for their future contracts. In this case, there was very little, if any, evidence to show that, and I am satisfied with the finding of the jury." Parke, B., "I think the case was properly left to the jury. The defendant, by taking shares in this speculation, gives authority to the directors to bind him by their contracts, in the event of the proposed number of shares being disposed of, and the proposed capital obtained. The secretary, who gives the order to the tradesman, is the party primarily liable; the directors, also, who give the order to the secretary, may be liable. A third party may become liable, if it can be shown that he has authorized the act of the directors in making the contract. But by proving the defendant to be an original subscriber, unless the proposed capital is raised, no such authority is shown." Alderson, B., "The authority given by the subscribers to the directors is a condi-

tional one, depending on the terms of the prospectus being fulfilled. In this case, that condition has not been fulfilled, and, therefore, the defendant is not bound by the contract of the directors."

There are other cases upon this subject which it will be unnecessary to notice, except in the shortest possible manner. In Nockles v. Crosby,[1] the point in issue was between the subscribers themselves, and not between the subscribers and third persons; but the leaning of the court was in favor of the doctrine which has just been considered. In Bourne v. Freeth,[2] the prospectus indicated that a partnership was to be established at a future time, subject to certain conditions, one of which was that the subscribers were to pay in their subscriptions to certain bankers, in such proportions as might be called for. The speculation failed. It was held that a person who had signed the prospectus, but who never paid his subscriptions, was not entitled to a share of the profits, and, therefore, not an actual partner. In Dickinson v. Valpy,[3] the evidence was that a person applied to a secretary of the company for thirty shares, which were appropriated to him, and upon which he paid the bankers of the company an installment of 5*l.* per share, and took scrip receipts. He afterward took these scrip receipts to the company's house, where there was a meeting of the directors, and paid a second installment of 10*l.* per share, and signed a deed, which, however, was not produced. He subsequently attended a general meeting of the shareholders. The court were strongly of opinion that there was not sufficient evidence to go to the jury that he was actually a partner.

These cases are much less severe upon persons taking shares in joint-stock companies than were others of a similar nature, decided in the Common Pleas soon after the year 1825. Since the case of Fox v. Clifton, that of Perring v. Hone, and others of a like complexion, may be considered as overruled.

Whether the company turn out successful or otherwise, if the shareholder neglect to perform the conditions which enable him to share the profits, he is not to be considered an actual partner. On the other hand, to charge a person as an actual partner in any company, it is not necessary to show that he executed the deed of settlement, if it can be proved from his letters or admissions that he was a partner according to the terms of that deed.[4] And *a fortiori*, if he can

[1] 3 Barn. & Cres. 814; 5 Dowl. & Ryl. 751.

[2] 9 Barn & Cres. 632; 4 Man. & Ryl. 512.

[3] 10 Barn. & Cres. 123; Loyd & Welsby, 6.

[4] Harvey v. Kay, 9 Barn. & Cres. 356.

be shown to have done acts of management, more especially if he became a director, he will be deemed an actual partner and chargeable accordingly.[1] In such case it is not necessary to show that the individual sought to be charged actually signed any contract. If he consented to be a director, or belonged to the board of management, he is responsible for the proceedings of the board.[2]

Signing the deed of settlement is conclusive evidence of partnership against those who sign it,[3] and they will be considered as partners from the time of the payment of their respective deposits.[4]

By holding out.

SEC. 833. Again, as we have already noticed, a man will become chargeable as a partner in a joint-stock company by holding himself out to the world in that character. There is but little to distinguish the evidence in these cases from that by which a man may be charged as an ordinary partner. On this point, however, some few matters may here be noted as more particularly applicable to the present subject. For, without question, they who appear as the active framers or carriers on of a company, they who canvass for subscriptions, who call the meetings, who hire the premises, who take pains to show the world that they are the conductors of the concern, must be looked upon as actual partners and be made liable accordingly. Still, even here, there are some niceties of distinction. For it seems that the doing of some few of these acts, without a general activity in the business, will not render a man a partner. The being present at a meeting where premises are proposed to be hired for carrying on the company, which premises are afterward hired, and even, in addition to this, the soliciting other persons to become members of the company, will not, it seems, make a man a partner if he did no other acts of partnership.[5] On the other hand, in a case where it was proved that A B had contributed to the funds of a building society, and had been present at a meeting of the society and party to a resolution that certain houses should be built, it was held that this made him liable in an action for work done in building those houses, without proof that he had any actual interest in them, or in the land on which they were built.[6]

Signing a prospectus of a future company does not make a man a

---

[1] Doubleday v. Muskett, 7 Bing. 118.
[2] Per Bosanquet, J., id.
[3] See Bird v. Aston, 6 Bing. 786, 788, cited; D. Tindal, C. J., Fox v. Clifton, id. 800; Shep. Touch. 71.
[4] Lawler v. Kershaw, 1 Mood. & Malk. 93.
[5] Bourne v Freeth, 9 Barn. & Cres. 632; 4 Man. & Ryl. 512.
[6] Braithwaite v. Skofield, 9 Barn. & Cres. 401.

partner to the world. Thus, in Bourne v. Freeth,[1] the prospectus of a company, after stating that the legislature had authorized the distilling of whisky in England, proceeded as follows: "The conditions upon which this establishment is formed are, first, they pledge themselves they will distil nothing but the purest malt spirit in the smallest stills that government will license, and on the same plan practiced in the Highlands of Scotland, for which purpose an eminent distiller from Inverness-shire will be engaged; secondly, the concern will be divided into twenty shares of 100*l.* each, which are transferable, five of which belong to Sir W. Fairlie, Bart., the founder of the works, the other fifteen subscribers to pay in their subscriptions to Messrs. Moss & Co., bankers, Liverpool, in such proportions as may be called for; thirdly, the concern to be under the management of a committee of three of the subscribers to be chosen annually, upon the 10th of October; fourthly, regular books to be kept which shall be open for the inspection of any of the subscribers, and a division of the profits made twice a year at Lady-day and Michaelmas; fifthly, 10*l.* per cent to be paid into the bank on or before the 1st day of June next." It was held that this prospectus imported only that a company was to be formed, not that it was actually formed, and that a person who signed it did not, by so doing, hold himself out to the world as partner, and, consequently, was not liable in an action for goods sold and delivered to the company. In this case Bayley, J., observed that the plaintiffs, when they saw the defendant's name to the prospectus, had no right to infer from the terms of it that he had become a partner at the time when he signed it, they ought, before they delivered goods on his credit, to have inquired whether he had become a partner subsequently, and, if they had so inquired, they would have found that he had not.

Again, in order to charge a person successfully with having held himself out as a partner, the act on which the party is so charged must appear to have been voluntary. In Fox v. Clifton,[1] it was sought to charge the defendants with having held themselves out as partners, not merely by reason of their having paid deposits, but because their names, together with those of others who had paid deposits, had been entered in a book at the counting-house, which book was shown to the plaintiff by the secretary of the company upon the plaintiff's application to know their names. But Tindal, C. J., held that the communication of this book was no act done by the defendants them-

[1] *Supra.* [2] 6 Bing. 776.

selves, or by their authority or permission, so as to make them nominal or ostensible partners.' There was no evidence, he said, that the defendants knew of the existence of any copy of the list at the counting house, still less any evidence that such list was made up or shown to any one with their permission or knowledge. The holding one's self out to the world as a partner, as contra-distinguished from the actual relation of partnership, imported at least the voluntary act of the party so holding himself out. It implied the lending his name to the partnership and was altogether incompatible with the want of knowledge that his name had been so used.

Liability of promoters or provisional directors.

SEC. 834. Not only have the subscribers or allottees in a scheme for a company which has not advanced to completion been held not liable for debts incurred to strangers in the name of the company, but it has been decided in some important cases both before and since the passing of the Joint-Stock Companies Registration Act, that when a scheme for a joint-stock company proves abortive, that is, when it has never arrived at the point set forth by the promoters to the subscribers as the starting point, the subscribers may recover back their deposits.

Thus, where a scheme for establishing a tontine was put forth, stating that the money subscribed was to be laid out at interest, and after some subscriptions had been paid to the directors, in whom the management of the concern was vested, but before any part of the money was laid out at interest, the directors resolved to abandon the project, it was held that each subscriber might, in an action for money had and received, recover the whole of the money advanced by him, without the deduction of any part toward the payment of the expenses incurred.[1]

In Blain v. Agar,[2] it was held by the Vice-Chancellor that the shareholders in a joint-stock company are entitled to relief where the conduct of the directors has been a violation of the terms on which the company was formed, and that some of the shareholders may file a bill to have their deposits repaid without making all the other shareholders parties, if they are ignorant of their names.

The case since the statute is Walstab v. Spottiswoode,[3] determined in the Court of Exchequer in Trinity term last. The facts of this case will fully appear from the following judgment of the Court of

[1] Nockels v. Crosby, 3 B. & C. 814. The three following sections are from Bissett on Partnership.

[2] 2 Sim. 289; see, also, Green v. Barrett, 1 Sim. 45.

[3] 10 Jur. 460, 498.

Exchequer, delivered by Pollock, C. B.: "This was an action of assumpsit. The declaration contained a special count founded on an alleged contract to deliver scrip; there was also a count for money had and received. At the trial before me on the 27th February, it appeared that the defendant was a member of the provisional committee of the Direct Birmingham, Oxford, Reading and Brighton Railway Company, registered provisionally under the 7 & 8 Vict., c. 110. The prospectus announced the capital to be 2,000,000*l.*, in 80,000 shares of 25*l.* each share. The deposit required was stated to be 2*l.* 12*s.* 6*d.* per share. On the 7th October, 1845, the plaintiff applied to the provisional committee for shares, according to the form directed by the committee (which form it is not necessary now to state). On the 18th October, the plaintiff received a letter of allotment in the following form:

"'Letter of allotment—(not transferable).

Direct Birmingham, Oxford, Reading and Brighton Railway Company.

Deposit, 2*l.* 12*s.* 6*d.*

No. of letter, 128.
No. of shares, 30.
46, Moorgate-street, London,
18th October, 1845.

"'The committee of management have allotted to you thirty shares in this undertaking, and I am directed to request you will pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 78*l.* 15*s.*, into one of the under-mentioned banks, on or before Friday, the 24th day of October, 1845, or this allotment will be null and void. This letter, with the banker's receipt appended hereto, will be exchanged for scrip on your presenting it at the office of the company and executing the parliamentary contract and subscriber's agreement, which will lie at the above offices on or before the 27th October, and due notice will be given when the deeds will be sent into the country.'

"This letter was signed by the secretary, and set out the names of several bankers, and the plaintiff in due time paid the deposit on the thirty shares into the London Joint-Stock Bank, the bankers of the company, and on the 27th October applied for scrip. The time for delivering scrip was extended by the provisional committee to the 6th November. On the 12th November the plaintiff applied again; and after several other fruitless applications at the office of the company, the plaintiff was told by the secretary that the directors did not mean to issue scrip; and upon the plaintiff requiring her money

to be repaid, the final answer given at the office, by one of the provisional committee, not the defendant, was, that a statement would be made of the concerns of the company and the surplus would be divided. It was admitted at the trial that 400,000 shares had been applied for; 70,000 had been allotted; but about the 25th October, 1845, public confidence in railway schemes having been much shaken, the deposit was paid on 4,000 shares only, a number much too small to justify proceeding with the scheme. The plaintiff, failing to get scrip or her money again, brought the present action.

"At the trial it was contended by the defendant's counsel that the defendant was not liable under either of the counts in the declaration,—that the special count could not be supported, and that the defendant was not liable on the count for money had and received. A verdict was found for the plaintiff under my direction, with liberty for the defendant to move to enter a nonsuit if there was no evidence to support the verdict, all the points raised by the defendant's counsel being reserved. Accordingly, Mr. Martin in Easter Term obtained a rule which was argued on the 29th and 30th May last, before me and my brothers, Anderson, Rolfe, and Platt.

"For the defendant it was contended that the contract as laid in the special count was not proved, and that the defendant was under no contract to deliver scrip. But the argument chiefly turned on the count for money had and received; and it was alleged that the subscribers became a *quasi* partnership, and that their subscriptions went into a common fund to be applied for the general benefit, and in consequence that the plaintiff could not sue the defendant at law. A further point made was, that the application being for an allotment of shares, which in fact had been allotted, the plaintiff had really obtained all she asked for, and had no grounds of complaint; and lastly it was said, that there was no evidence of the concern being at an end, as the defendant was not bound by what another member of the committee stated; and unless the concern was abandoned, money had and received would not lie.

"For the plaintiff it was argued that the special count was proved, and that there was an evidence that the concern was at an end; and the case of Nockels v. Crosby[1] was cited as an authority.

"We do not think it necessary to give any opinion on the special count, as to which some doubt may well be entertained, because we are all of opinion that the plaintiff is entitled to recover on the count

[1] 8 B. & C. 814.

for money had and received, and as the plaintiff cannot be entitled in a case like the present to damages on the first count, for not delivering scrip, as upon a contract broken, and also to have her money returned as on a contract rescinded, we are of the opinion that the verdict for the plaintiff on the count for money had and received ought to stand, but that the verdict for the plaintiff on the first count should be set aside, and a verdict entered for the defendant.

"With respect to the first point made for the defendant, that the subscribers became a *quasi* partnership, and that their subscriptions became a common fund to be applied for the general benefit, so that no one could claim back his subscription, we are of opinion that such is not the true result of the publication of the prospectus by the provisional committee (of which the defendant was one), of the application for shares, and the allotment, and the payment of the deposit. We think in this case no partnership ever actually commenced. In the case of Pitchford v. Davis,[1] it was decided that where a prospectus was issued for a speculation to be carried on by means of a certain capital, a subscriber did not become a partner unless the terms of the prospectus were in that respect fulfilled. And that decision has been since frequently acted on in this and other courts. In the case of Nockels v. Crosby, cited by the plaintiff's counsel, a similar doctrine was held. It appears to us that the application for shares and payment of the deposit amounts to nothing, if the shares subscribed for are so few that the concern cannot proceed and the scheme must necessarily be abortive.

"With respect to the point that the plaintiff applied for shares, and that shares were actually allotted, and therefore no action can be sustained, it is a sufficient answer to say that the allotment of shares in an abortive scheme, which does not correspond with what the prospectus held out, is really not a compliance with the application. If the scheme has wholly failed and has ceased even as a speculation, nothing whatever has been allotted to the subscriber.

"But it was urged that there was no evidence of the concern being at an end. We think that the answer given at the office by one of the provisional committee, that a statement would be made and the surplus would be divided, was evidence to go to the jury that the concern was abandoned, and unopposed as this was by any evidence on the part of the defendant, we think that the jury were well warranted in finding that the scheme was at an end. If so, we think, on the authority

[1] 5 M. & W. 2.

of Nockels v. Crosby, that the plaintiff is entitled under the count for money had and received to recover back her deposit.

"A question was raised, though not much argued, whether there was any difference between one portion of the deposit and another. It being, as we think, manifest that the deposit of 2*l.* 12*s.* 6*d.* consisted of 2*s.* 6*d.* being 10*s.* per cent on the 25*l.* in pursuance of the 23d clause of the act referred to, and the residue being 10*l.* per cent required to be deposited by the standing orders of Parliament — we think it is clear, beyond all doubt, that the amount paid in order to be deposited in pursuance of any standing orders must be returned to the plaintiff. There is no foundation whatever for a claim to retain this, which was paid for a specific purpose — and the concern abandoned before the money could be applied for that specific purpose. But we think that the remainder of the money may also be claimed back, and that the language of Littledale and Holroyd, JJ., in Nockels v. Crosby, applies to this part of the case. To use the language of Holroyd, J., in that case, 'the concern was never really set agoing, and the expenses incurred in setting a scheme on foot are not to be paid out of the concern, unless they are adopted when it is in actual operation. All the steps taken were only preparatory to carrying the project into effect, and as it never was carried into effect, the plaintiff was entitled to have back the whole of the money that he advanced.'

"On these grounds, we think that the verdict ought to be entered for the defendant on the first count, but that the verdict for the plaintiff on the count for money had and received ought to stand. Our judgment, therefore, must be for the plaintiff."

There being clearly no partnership in the stage of the proceedings which we are now considering, it is the fact of appearing in the character of a promoter or director, and exercising some degree of personal superintendence that determines the question of liability. Thus, in Doubleday v. Muskett,[1] the defendants were appointed directors of a joint-stock company for supplying the town of Brighton with water, attended meetings of the directors, and accepted and paid the first installment upon shares required to qualify them to act as directors. The resolutions entered into at the first formation of the company, and the prospectus subsequently issued, stated that an act of Parliament would be applied for to regulate and establish the company. After the defendants had ceased to attend meetings of the company, the directors advertised for tenders for the excavation of reservoirs,

[1] 4 M. & P. 750; 7 Bing. 110.

and employed the plaintiff to do the necessary work. It was held that the defendants (they having once accepted the office of directors, and not having since done any act to divest themselves of the responsibility attached to that character), were liable to the plaintiff for the work done by him, although they were not actually parties to the contract, and although no act of Parliament for incorporating the company had been obtained.

And in Maudslay v. Le Blanc [1] it was held that a person was liable for an engineer's bill, although it was not proved that he had executed a deed as a director, or was present at the meeting at which the order was given, but his name appeared as a director in a printed prospectus, and he had attended at subsequent meetings, and also inspected the works while they were in progress.

But if it can be shown that the plaintiffs agreed to look to some particular fund for payment, and that the committee were to be without personal liability, this will have an effect in removing the liability from the provisional committee.[2]

In Woods v. Duke of Argyll [3] it appeared that both the defendants, the Duke of Argyll and Sir James Cockburn, had signed an agreement to take shares in a company which was proposed to be formed under the name of the British-American Association for emigration and colonization; but one condition of that agreement was that a deposit of 5*l.* was to be paid when shares to the amount of 50,000*l.* had been subscribed for. The proposed amount was never realized, and no deposit had therefore been paid. In the prospectus the name of the Duke of Argyll was inserted as president, and that of Sir James Cockburn as a member of what was called the consulting council. By the prospectus it also appeared that the whole management of the undertaking was to be placed in the hands of six commissioners; and further, that no peer or baronet who should become a vice-president should be liable, as such, to the expenses of the association. Upon these facts, the Lord Chief Justice left to the jury to say, whether there was any evidence of a direct contract between the parties; or, secondly, whether there was any partnership formed of which the defendants were members; or, whether, thirdly, the defendants had held themselves out to the plaintiff as members of the association. The jury answered all these questions in the negative, and a verdict was, therefore, entered for the defendants, which the Court of Common Pleas on a motion for a new trial refused to set aside.

[1] 2 Car. & P. 409, n.
[2] Kerridge v. Hesse, 9 Car. & P. 200.
[3] 8 Jur. 62.

In the subsequent case of Lake v. Duke of Argyll,[1] in an action against the Duke of Argyll as a member of the same company, the jury having returned a verdict for the plaintiff, on a motion for a rule nisi to enter a nonsuit, or for a new trial, Lord Denman, C. J., delivered the judgment of the Court of Queen's Bench: "The question in this case was whether the defendant had made himself liable for certain printer's work. I was asked to direct a nonsuit, because it was said there was no evidence to show the defendant's liability. I thought, however, that I could not nonsuit, as, undoubtedly, some proof was given of acts done by the defendant, which were fit to be considered by the jury, in order to determine whether he had incurred any individual liability, and on the effect of which the plaintiff had a right to take the opinion of the jury. The case of Wood against this same defendant, tried in the Court of Common Pleas, was referred to, where the Lord Chief Justice laid down the law to the jury, and summed up very strongly for the defendant. I adopted the same course, and laid down the law to the jury, I believe, in the very words there employed, and summed up somewhat in favor of the defendant; observing, also, that, upon the evidence in the cause, there was strong reason for supposing that credit had been given by the plaintiff to other persons, who had previously been the plaintiff's customers, and not, in point of fact, to the defendant. The jury, in the Court of Common Pleas, found a verdict for the defendant. In this case the jury found a verdict for the plaintiff; and a motion has been made for a rule to show cause why a nonsuit should not be entered, or why there should not be a new trial. We expressed our opinion when the rule was applied for, that there was no ground for a nonsuit, for the reasons which we then stated. We now, therefore, come to consider the application for a new trial. It appears that certain persons agreed to form an emigration society; they held some meetings; the names of several persons were put forward as the names of those who were engaged in forming this society; and they afterward obtained the consent of the defendant to be named president,— that involving a consent to the publicity of such appointment. Some meetings were afterward held, at one of which the defendant acted as president, and signed certain resolutions there agreed upon, and, among others, a resolution that the proceedings of that meeting should be printed. The defendant was also publicly held out to the world as president of the intended association, in papers which were regularly transmitted

[1] 9 Jur. 295.

Lord Ellenborough, in the case of Rex v. Dodd,[1] are fully applicable: "This is a mischievous delusion, calculated to ensnare the unwary public. As to the subscribers themselves, indeed, they may stipulate with each other for this contracted responsibility; but as to the rest of the world it is clear that each partner is liable to the whole amount of the debts contracted by the partnership."[2]

In Bartlett v. Lambert,[3] the action was brought against the defendant, as a member of the provisional committee of the Great Welsh Junction Railway Company, to recover the price of stationery supplied to the company. Some time after the formation of that company, the defendant intimated by letter his consent to become a member of the provisional committee. His name was accordingly published as one of the persons constituting that committee, and he afterward took the chair at one of its meetings. It was held by the Court of Exchequer that he might be sued for so much as had been furnished *after* the date of the letter declaring his willingness to act on the provisional committee.[4]

And the mere fact of having exercised some degree of personal interference in the management, even though the party may not have formally assumed the character of director, will be sufficient. Thus, in an action by the solicitor of an intended company for preparing their copartnership deed, it was proved that at a meeting of the company at which the defendant was present, but before he became a director, the draft of the deed was produced, and its clauses discussed, and that the defendant took a part in suggesting alterations in the draft. Lord Denman, C. J.: "The question is, whether the defendant Francis so acted before he became a director as to become one of the employers of the plaintiff in preparing this deed. Where persons become directors in one of these proposed companies, they make themselves liable, and other persons may do so if they interfere in the management, and hold themselves out as persons giving the order."[5]

---

[1] 9 East, 516.

[2] 9 East, 527.

[3] 10 Jur. 416.

[4] It having been urged on behalf of the defendant that he limited his responsibility to the amount of his shares, Alderson, B., said: "All that is *inter se*," and in reference to the following question: "The majority of the committee of a company might be in favor of ordering certain goods, and the minority against it, would the minority in that case be liable for the goods when supplied?" The same learned judge observed, "The case has been put of the defendant being one of a minority of the committee who dissented from giving these orders; but if that were so, it lay on the defendant to show it. I am by no means prepared to say that the defendant would not be exempt in such a case, for he gave no actual authority to pledge his credit, and there could be no implied authority as he dissented from the act."

[5] Bell v. Francis, 9 Car. & P. 66. And in Harrison v. Heathorn, 6 Scott's N. R. 735, it was held by the Court of

Liability of the company.

SEC. 835. Another important question of liability is whether a company after incorporation are bound by any thing which may have passed, or by any contract which may have been entered into by the projectors of the company, before their actual incorporation. In the case of Edwards v. The Grand Junction Railway Company,[1] it was decided by Lord Cottenham that an incorporated company will be bound by the agreement of its individual members, acting before incorporation on its behalf, if the company has received the full benefit of the consideration for which the agreement stipulated on its behalf. His Lordship said: "The railway company contend that they, being now a corporation, are not bound by any thing which may have passed, or by any contract which may have been entered into by the projectors of the company, before their actual incorporation. If this proposition could be supported, it would be of extensive consequence at this time, when so much property becomes every year subjected to the power of the many incorporated companies. The objection rests upon grounds purely technical, and those applicable only to actions at law. It is said that the company cannot be sued upon this contract, and that Moss entered into a contract, in his own name, to get the company, when incorporated, to enter into the proposed contract. It cannot be denied, however, that the act of Moss was the act of the projectors of the railway; it is, therefore, the agreement of the parties who were seeking an act of incorporation that, when incorporated, certain things should be done by them. But the question is, not whether there be any binding contract at law, but whether this court will permit the company to use their powers under the act, in direct opposition to the arrangement made with the trustees prior to the act upon the faith of which they were permitted to obtain such powers. If the company and the projectors cannot be identified, still it is clear that the company have succeeded to, and are now in possession of all that the projectors had before; they are entitled to all their rights, and subject to all their liabilities. If any one had individually projected such a scheme, and in prosecution of it had entered into arrangements, and then had sold and assigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser; but in this

Common Pleas that the presence of a party at a meeting of a company was sufficient to render him liable as a partner or shareholder.

[1] 1 Myl. & Cr. 650.

court it would be otherwise. So here, as the company stand in the place of the projectors, they cannot repudiate arrangements into which such projectors had entered; they cannot exercise the powers given by Parliament to such projectors, in their corporate capacity, and at the same time refuse to comply with those terms, upon the faith of which all opposition to their obtaining such powers was withheld. The case of The East London Water Works Company v. Bailey [1] was cited to prove that, save in certain excepted cases, the agent of a corporation must, in order to bind the corporation, be authorized by a power of attorney; but it does not, therefore, follow that corporations are not to be affected by equities, whether created by contract or otherwise, affecting those to whose position they succeed, and affecting rights and property over which they claim to exercise control. What right have the company to meddle with the road at all? The powers under the act give them the right; but before that right was conferred, it had been agreed that the right should only be used in a particular manner. Can the company exercise the right without regard to such an agreement? I am clearly of opinion that they cannot; and having before expressed my opinion that the contract is sufficiently proved, it follows that the injunction granted by the Vice-Chancellor is in my opinion proper, and that this motion to dissolve it must be refused with costs. The case of the Vauxhall Bridge Company v. Earl Spencer [2] was cited for the trustees, and it certainly is a strong authority in favor of their claim, Lord Eldon having in that case expressed an opinion, that the withdrawing opposition to a bill in Parliament might be a good consideration for a contract, and having recognized the right of an incorporated company to connect itself with a contract made by the projectors of the company, before the act of incorporation. On the other hand, Dance v. Girdler [3] was cited for the railway company; but that was an attempt to make a surety liable beyond his contract, and Sir James Mansfield, in his judgment in that case, relied much upon the want of identity between the society with whom the contract was made and the corporation; and the question there was as to a legal liability, not as to an equitable right. It was contended for the railway company, that to enforce this equity would be unjust toward the shareholders of the company who had no notice of the arrangement. To this two obvious answers may be made: first, that the court cannot

[1] 4 Bing. 283.
[2] 2 Mad. 356; Jac. 64.
[3] 1 Bos. & Pull. (N. R.) 34.

recognize any party interested in the corporation, but must look to the rights and liabilities of the corporation itself; and, secondly, that there is nothing in the effect of the injunction inconsistent with the provisions of the act, for although the act provides that bridges shall not be less than fifteen feet in width, it does not provide that they shall not be made wider. The company might under this act clearly agree that this or any other bridge should be fifty feet wide."

There is no *implied* authority in a member or director of a joint-stock company to draw or accept bills of exchange on behalf of the company and thereby to bind the company.[1] In Bramah v. Roberts,[2] Tindal, C. J., said: "The right of one director to draw a bill upon the rest, and still further the power of one director to accept a bill for himself and the others, so as to make those others liable, according to the case of Dickinson v. Valpy,[3] in the authority of which case we entirely concur, is not a right or power implied by law like that which belongs to one member of an ordinary partnership in trade with respect to bills drawn and accepted for the purposes of the trade, it must depend upon the powers given by the charter or deed of agreement under which the company is established and constituted, or some other agreement between the parties, whether a bill so drawn and accepted shall or shall not have that legal effect."

Legal remedies affecting joint-stock companies, their individual members and strangers.

SEC. 836. The combination of the funds of numerous individuals in one joint stock while it purports to give to companies trading upon such united capital power commensurate with the objects which they

[1] Dickinson v. Valpy, 10 B. & C. 128; Bramah v. Roberts, 3 Bing. N. C. 963. In the absence of any express authority in one of the directors of a joint-stock company to bind the rest of the directors or the shareholders by his acceptance of bills of exchange, no such authority can be implied by law. Brownald v. Roberts, 5 Scott, 172. If a partnership is organized for mining or for farming purposes the directors or active agents thereof will not, as incident thereto, possess a power to draw or accept bills, or to draw or indorse notes for the company. There should be some proof that an express authority is given for such a purpose, or that it is implied by the usages of the business or the ordinary objects or exigencies thereof. Story on Part. 189. Where the directors of a corporation have power to bind it by their contracts, a majority of the directors may do it. Cram. v. Bangor House, 13 Me. 354. If the officers, whose appropriate business it is to make loans for a corporation, make unlawful loans, the corporation is bound by their acts. L. & F. Ins. Co. v. Mechan F. I. Co., 7 Wend. (N. Y.) 31. A president of a company cannot borrow money in its name and pledge its responsibility unless authorized by a charter or by a by-law or resolution of the directors. Id. A corporation is not bound by a note given by its agent for a debt contracted by its members before they were incorporated unless he had express authority by vote. White v. Westport Cotton Manuf. Co., 1 Pick. (Mass.) 215.

[2] 3 Bing. N. C. 972.

[3] 10 B. & C. 128.

propose to themselves, would have been accompanied with difficulties in practice perhaps more than sufficient to counterbalance the advantages of augmented funds, had not the authority of Parliament been exercised to relieve them from the stringency of those principles of the common law, which, adapted as they have been to the regulation of ordinary partnerships, and proper to secure the rights and enforce the duties of their individual members, were calculated to render unwieldy, or even to paralyze the operations of the former more numerous bodies. It was highly expedient that a new code should be introduced, which, while it sanctioned the direct management of such undertakings by a selected body of directors, subject to the due control of their proceedings, by the will of those whose interests were embarked in the same risk (expressed by a majority at meetings to be held from time to time), and armed the directors with efficient means of securing the actual payment of the subscribed fund, should also render more available the protection of the public and shareholders from the losses incident to fraudulent or delusive projects. At once to protect creditors and the public by attaching to these numerous but fluctuating bodies a continued responsibility, proportioned to the important character they assume, and to relieve their individual members by shortening the time during which they should respectively continue subject to the extended liabilities which they should incur, were objects, the attainment of which would be highly advantageous, without too wide a departure from the principles of English commercial law.

These companies become, by complete compliance with the statute, bodies corporate for the purposes of carrying on the business for which they were formed, of taking and enjoying their common property, and of suing and being sued. They thus acquire a separate legal existence, apart from that of their individual members, and are not hampered by technical difficulties, in the process of enforcing the performance of their engagements against persons who may have in fact contracted with them, whether such persons be merely shareholders of the company bringing the action, and, therefore, as copartners of the plaintiffs, not liable, according to the rules of pleading applicable to ordinary partnerships, to such proceedings at law, or whether they be joined, as defendants in the action, with other persons, some of them interested as copartners with the plaintiffs, and therefore exempt, according to the same technical rules, from the enforcement of the contract in a court of law; nor are they any longer compelled

to resort to the intervention of trustees, for the purpose of availing themselves of contracts either made or to be made on their behalf, being declared entitled in their corporate capacity to the benefit of all such previous contracts; and, by their actual investment with such character, exempted, in all future transactions, from the necessity of resorting to a course so circuitous and inconvenient.

By virtue of the same corporate quality the company becomes liable to be sued, as such, for its joint debts, and upon its joint contracts, and, in the first instance, to satisfy the judgments obtained against it, out of the common property, while the shareholders, without escaping their due responsibility to the public, are protected from unnecessary inconvenience. A similar immunity from actions at law is conferred by those statutes under which banking or other companies are empowered to sue and be sued in the name of their secretary or other public officer. In the case of Stewart v. Graves [1] (which was an action of assumpsit upon the common money counts, brought by the plaintiff as public officer of the "East of England Bank" against individual members of the "Southern District Banking Company," established and carrying on business under the stat. 7 Geo. VI, c. 46), the second plea, to the effect that the causes of action accrued against the defendants as members of such banking company and not otherwise, that one S. Bovill and W. Dunn had been duly appointed and registered, pursuant to the said statute, as public officers, to sue and be sued for and on behalf of the same, and that the said persons so appointed and registered were living and resident in England, and within the jurisdiction of the court, at the commencement of the suit, was held good in bar of the action, upon special demurrer. There was a third plea, to the effect that the causes of action accrued against the defendants jointly with certain other persons, therein named, as members jointly with the defendants, at the time of their accruing, of the "Southern District Banking Company," and that such other persons were then, and thenceforth until the commencement of the suit, members and copartners in the "East of England Bank," as public officer of which bank and on behalf of the members thereof, the plaintiff sued. This last plea was also demurred to and abandoned as unsustainable by the defendant's counsel. In the course of the judgment delivered by him Parke, B., said: "The principal objection to the second plea was that in the case of a company established and carrying on business under the 7 Geo. IV, c.,

[1] 10 M. & W. 711.

46, the individual members of it are liable to be sued upon the contracts of the company as they would have been, but for that statute, which, it was argued, gave an additional or cumulative, not an exclusive, remedy against the company by an action against the public officer." "We are all of the opinion that the creditors of a company so established and having a public officer have no remedy against the individual members, as at common law. And we are of this opinion upon the words of the ninth section, giving the remedy against the public officers, and upon the whole purview of the act." "It is clear from the recital in the act and the scope of most of its provisions that the legislature intended to give to corporations and copartnerships of more than six, within the limits therein mentioned, the power of being banks of issue, the Bank of England waiving its exclusive privilege in their favor, on the condition that the individuals should be liable for the bills and notes issued, or money borrowed by such corporations or companies, in the qualified mode pointed out by the act. This liability by the common law would not attach at all to individual members of corporations, and would attach, in a different mode from that provided for by the statute, to members of companies; for, at common law, those members only would be liable who were such when the contract was entered into; but, by the statute, not only those, but all who became members afterward, and until the bills, notes or debts were paid, are made liable. At common law, all the goods of the contracting parties and their persons would be liable to immediate execution; by the statute, the goods of the company are liable, and the members for the time being at the period of the execution, in the first instance, and afterward those who were so at the time of the contracts being entered into or carried into effect, or when the judgment was obtained thereon. In a proceeding against individuals, they would be liable to simple contract debts for six years, to specialties, for twenty; in the statutory mode of proceedings, the members who have ceased to be such for three years are exempt from debts of every description. Thus the liability, created by the statute, is very different from that which would exist without it; and it cannot be supposed that the legislature meant to leave it to the option of any creditor whether the members of the company should be subject to one species of liability or the other, still less that a creditor should have the power of depriving them of the statutory protection which is given to each after having ceased for three years to be a partner. The framers of the act had in view the convenience of the public,

and thereby provided a more convenient remedy to creditors than at common law; but they had also in view the benefit of the members of the company by restricting their personal liability." "We are of opinion, therefore, that this act of Parliament meant to give one remedy only, and that against the company, in the name of its public officer, and that the common-law remedy is taken away, at least where such officer exists and is in England; and, consequently, that the second plea is good in substance." "The third was properly abandoned by the defendant's counsel; on that the plaintiff is entitled to judgment."

In those cases where the shareholders are members of a company, incorporated for carrying on undertakings of a public nature, they are likewise made liable to execution upon a judgment, etc., against the company; but that the amount, leviable upon them individually, is limited to the extent of their respective shares in the capital not then paid up; and it is also enacted that if any such shareholders shall have paid any sum beyond the amount then due from him in respect of calls, he shall forthwith be reimbursed such additional sum by the directors out of the funds of the company.

Joint-stock companies possess a qualified corporate existence, enabling them to wield the combined resources of their numerous proprietors, guarded, however, from becoming a shield against the discharge, by their individual members, of the liabilities which the company may incur toward strangers; so the authority of Parliament has been exercised to confer upon the shareholders in every company a constitution, the principles of which are defined by the deed of settlement containing certain particulars required by the statute, which secure both the existence of a distinct executive body, and its responsibility at once to the shareholders and the public, nor are the reciprocal duties of the shareholders less carefully enforced by the enactment which makes the execution of the deed of settlement, or of some deed referring thereto, a necessary condition to the receipt by them of any dividends or profits, and to the exercise of any power or control or superintendence. The articles of this deed comprising the conditions upon which the directors acquire their powers, whether exercisable toward strangers or their own members, the courts of law enforce a strict adherence to its provisions, not, however, without a due consideration of the reciprocal duties incumbent upon the proprietors. In the case of Smith v. Goldworthy[1] which was an action for calls, it was by the deed of settlement covenanted that certain per-

[1] 4 Q. B. 430.

sons, who had formed themselves into a company for working iron mines, should be and continue such company for 61 years, unless sooner dissolved, as in the deed was provided; that the company's capital should consist of two millions sterling, divided into 20,000 shares of 100*l.* each, and that the affairs of the company should from thenceforth be conducted and managed under and subject to the regulations thereinafter contained; and clause 29 ordained that for the better conduct and management of the affairs of the company, a special general meeting, called for the purpose, might from time to time amend, alter, or annul any of the clauses of the deed, or of the existing regulations and provisions of the company and substitute others, provided that such amended or altered regulations and provisions should not extend to alter the regulations afterward laid down in the deed, confining the individual responsibility of each proprietor, as between himself and his co-proprietors, for calls, debts, and other demands, to the amount of his share in the company's capital for the time being. Provision was made, by other clauses, for dissolving the society. The points in dispute are clearly stated in the judgment of the court delivered by Lord Denman, after argument upon several demurrers both to the pleas and replications. Lord Denman, C. J.: "This is an action of covenant brought by the plaintiff as secretary to the British Iron Company.[1] The company's original deed of settlement was dated 28th of April, 1825, and by it the subscribers covenanted with three trustees to pay such installments on their shares as should be called for by the directors in pursuance of the powers vested in them. The defendant having become proprietor of shares, executed an indenture, dated 7th March, 1840, by which he covenanted to observe the covenants in the deed of 1825, and to pay such installments upon his share as should be called for by the directors." "The main objections to the plaintiff's right to recover are two: first, that the original number of directors, as fixed by the deed of settlement, had been reduced, by resolutions of the company, from sixteen to six; secondly, that the deed of settlement having provided that there should be 20,000 shares of 100*l.* each, those shares had been reduced by a resolution of the company to 50*l.* each, and again by a subsequent resolution raised as before to 100*l.*" "It is contended by the defendant that these resolutions are not within the authority of the 29th clause of the deed of settlement. The deed

[1] By stat. 3 & 4 Vict. c. 96, power was given to the British Iron Company to sue and be sued in the name of their secretary.

provides in the commencement, 'that the direction and management of the affairs of the company shall be confided to sixteen directors;' and by clause 102 'that the directors of the company shall never consist of more or less than sixteen.' It is argued from this latter clause that the number of sixteen directors was part of the constitution of the company, essential to its existence and unalterable, and that the 29th clause does not extend to it." Looking at the several clauses together we are of opinion that it was competent to two special general meetings properly convened to alter the number of directors. "The second objection is of a more formidable description. The amount of the shares is properly part of the constitution of the company, and does not strictly depend upon any clause, regulation or provision of the deed; the alteration of the shares seems, therefore, not to come within the meaning of the 29th clause. If it did, we should hardly consider that the proviso in that clause forbade the alteration, because the reduction of the value of the shares could not have the effect of rendering any proprietor liable, as between himself and the other proprietors, beyond such reduced value, although it might, as was ingeniously argued, diminish the fund to which he had to look for indemnity in the event of being sued by third persons for debts of the company. Admitting, then, that the resolutions of 7th November and 4th December, 1826, by which the shares were reduced, were not justifiable, the question will be what consequences followed from them. On the part of the plaintiff, it is argued that they were simply void and wholly immaterial, and that the shares always remained in point of law 100*l.* shares; or, if not, that any mischief which might arise from these resolutions was cured by the subsequent resolutions of 4th May, and 25th May, 1838, by which the value of the shares was restored." "The defendant further answers that the effect of the resolutions reducing the shares was to dissolve the company. We do not think that any such effect followed, but rather that they were simply void and inoperative. Neither does it lie in the mouth of the defendant, who became a proprietor after those resolutions passed, to say that no company then existed. We think the shares always were *in* point of law 100*l.* shares, and, therefore, that the 37th and 40th pleas are no answer to the action. We also further think that if the shares were reduced at one time to 50*l.*, still the resolutions of 1838 restored them to their original value; and that the concurrence of the defendant in carrying those resolutions into effect is a material question. Neither is it necessary to show that such concurrence was by

deed, for it in no way alters the covenant of the defendant. That covenant binds him to observe the covenant in the deed of settlement, which deed provides for alterations to be made by resolutions not under seal, but to be passed at special general meetings; the resolutions themselves are not required to be by deed; nor can it be in any way requisite that the concurrence of the defendant in them should be by deed. For these reasons we are of opinion that the plaintiff is entitled to the judgment of the court."

It has been seen that with regard to projects which do not arrive at the working condition held forth in the projectors' prospectuses, or otherwise, an objection founded upon such discrepancy, by original allottees refusing to become shareholders, is held to be fatal to the promoters' claim for deposits or calls.[1] This objection may, however, be provided against by the deed of settlement; and if so, becomes untenable by those who have executed such deed. In the case of Hutt v. Giles,[2] the deed, bearing date 1st March, 1841, recited that each of the parties thereto had contributed toward the (intended) capital of 50,000*l.*, 125*l.* in respect of every share subscribed for or allotted to him, which had been paid, and that the business of the company was commenced on the 1st February, 1840. The parties also mutually covenanted that they and other parties to become shareholders, as thereinafter mentioned, would be and continue, until dissolved under the provision thereinafter contained, a company by the name, etc., upon the terms and conditions thereinafter expressed, viz.: in substance (among others), that the capital should consist of 50,000*l.*, agreed to be raised in shares of 500*l.* each, with power to the directors, with the concurrence of a general meeting, to augment or diminish the capital, as therein mentioned; that, notwithstanding the payment of the said installments of 125*l.* per share, the remaining 375*l.* per share should be payable in such sums, not exceeding 125*l.* at one payment, as the directors at an extraordinary board should appoint; that the directors should, before the next and every subsequent general meeting, declare, what, if any, dividend should be made at such meeting next following; and that notwithstanding any applicant for a share, or a subscriber had neglected, or might neglect or refuse to pay his subscription or to execute the deed, although the entire number of shares should not be subscribed for on or before the execution thereof, yet the deed and its provisions should be valid and effectual. The company was not empowered to sue and be sued, but

[1] See Fox v. Clifton.

[2] 12 M. & W. 492.

the deed contained a clause binding every shareholder if indebted to the company, on application to pay his debts, as if an ordinary debtor, and not interested as a partner therein. The action was brought for a second installment of 125*l.*, for which a call had been duly made by the directors, and it was held on demurrer to the defendant's plea (to the effect that only 40,000*l.* had, at the time of making the call, or as yet, been subscribed for), that, notwithstanding such deficiency in the subscribed capital, the parties who had executed the deed were liable to the calls made by the directors on the 375*l.* per share remaining unpaid. Parke, B.: "I am of opinion, on the true construction of the deed, that it was not a condition precedent to the payment of the calls that the entire capital should be first subscribed; and, therefore, that the plea is bad in substance. * * * "The deed itself recites that the business of the company has already commenced and, therefore, that the shareholders have become entitled to a dividend, if any profits have been realized."[1] Compliance with an enactment *in their act of incorporation* declaring what the amount of capital shall be and the number of shares into which it shall be divided to the extent of effecting such division of the required capital, although the amount be not completed by subscription, is, it appears, sufficient to protect an incorporated company against a similar defense.[2]

The adjustment of reciprocal rights and duties between the directors and the shareholders effected by the deed of settlement being, as was observed, adapted to promote the working condition of joint-stock companies, is determined immediately upon their dissolution. The proprietors are thereupon divested of the special rights and exemplified from the duties by that instrument conferred upon them, and with regard to third persons are considered in a court of law in the light of individual members of an ordinary partnership. The injurious consequences of such determination might perhaps be avoided by inserting in the deed itself provisions regulating the method of winding up the affairs of the company and defining the persons to be intrusted therewith. Apart from such precaution, the partnership, which, notwithstanding the dissolution, subsists for the purpose of making good its previous engagements, is saddled with that onerous duty, though reduced to an unmanageable state, the authority as well of the majority of shareholders to bind the minority as of the directors to bind the other shareholders having *ipso facto*

[1] 12 M. & W. 501.

[2] London & Brighton Railway Co. v. Wilson, 6 Bing. (N. S.) 8 Dowl. 40.

ceased. An arrangement, both natural and prudent, intrusting to the existing directors the realizing of the assets, the discharge of outstanding liabilities, and the distribution of the surplus among the shareholders may be, and in the case of Lyon v. Haynes and others[1] was made by resolutions[2] passed at a meeting of shareholders, from which, however, two of them were absent. In winding up the affairs, the directors, with the acquiescence of all the shareholders, in fact, proceeded; but the court, in an action brought by a shareholder against the directors for not declaring a dividend out of the surplus, held that the partnership having been dissolved the members present could have no legal authority to bind the absent, unless it had been expressly given.[3] It was also held that the directors, without special advantage or compensation awarded to them in that behalf, had undertaken a burdensome trust; a duty unconnected with any profit and exercisable according to their judgment; that they were bare trustees, liable to account in equity, but not bound by any legal contract upon which an action could be brought by each shareholder,[4] and the court drew a marked distinction between the case before them and that of Owston v. Ogle,[5] relied upon by the plaintiff's counsel, in which there was an express and several agreement in writing between the defendant and each part owner to make out an account and divide the net profits on the ship's return.[6]

The powers given by the legislature to companies incorporated for carrying on undertakings of a public nature are conferred indeed at the instance of the projectors, but to be exercised not only without uncompensated injury to individuals, but for certain proposed ends of public advantage. These powers are so large and so peculiar that the legal remedies ordinarily in use where individuals only are concerned are comparatively inefficient and the courts of law regard these companies as strictly bound by contracts, the terms of which, on behalf as well of the public as of every person interested in any thing to be done under them, are contained in the acts of incorporation no less than the peculiar powers and privileges which they confer. The Court of Queen's Bench will not suffer these proposed advantages to be defeated, but will, on due application, exert its mandatory juris-

[1] 5 M. & Gr. 504, 519.

[2] It was resolved that the assets should be realized with all convenient speed, and that the surplus, after meeting the engagements of the company, should be divided among the shareholders ratably, in such dividends as the directors might from time to time think fit, a dividend to be declared at least once in every six months. 5 M. & Gr. 519.

[3] Lyon v. Haynes, 5 M. & Gr. 542.

[4] 13 East, 538.

[5] Id. 546.

[6] 5 M. & Gr. 546.

diction to enforce upon these companies the performance of their parliamentary bargains, both by executing the public work sanctioned by the legislature and by providing compensation for private injuries inflicted in the course of their operations. Thus where a railway was constructed by a company in whose act of incorporation it was provided that "all persons should have free liberty to pass upon and use the same with wagons and other carriages constructed as therein described upon payment of the rates of tolls thereby prescribed," and the directors had taken up the rails and abolished part of the way, a *mandamus* was granted commanding the company to reinstate the road. It was contended that an indictment against the company was the proper remedy, upon which Abbott, C. J., in delivering judgment, observed: "If an indictment had been a remedy equally convenient, beneficial and effectual as a *mandamus*, I should have been of opinion that we ought not to grant the *mandamus*, but an indictment is not such a remedy. The court indeed may impose a fine, to be levied by distress, but the corporation may pay the fine and refuse to reinstate the road. The corporation being liable to an indictment is no objection to the granting of a *mandamus*."[1] And where the company, having obtained an act of Parliament empowering them to construct a railway from London to Norwich and Yarmouth, had nearly exhausted their funds in the execution of the work as far as Colchester only, it was held on the application of certain shareholders, who were owners of land beyond Colchester, that a *mandamus* should issue directing the company to set out deviations and to make purchases below Colchester, although the majority of the shareholders had passed resolutions, at meetings duly convened, confirming the opinion of the directors, that it was inexpedient to carry the works beyond the point at which they had arrived. Affidavits by several of the applicants were read purporting that the directors, before obtaining a second act of Parliament under which they were then acting, had determined not to purchase the lands required for the railway beyond Colchester, but that upon the interference of the deponents they had assured them that the line should be completed, upon which the deponents had withdrawn their opposition. Lord Denman, C. J.: "There is no higher duty laid upon this court than to exercise a vigilant control over persons intrusted with large and extensive powers for public purposes, and to *enforce the execution of such purposes*, and the more so as we are acquainted with no other sufficient remedy." "Interfer-

[1] Rex v. Severn & Wye R. Co., 2 B. & A. 646.

ence by *mandamus* is occasioned by inferior courts or persons refusing to proceed in some course prescribed by law, and not in consequence of misapprehension or error in their course, provided they have entered upon it." And, after remarking that the case did not seem to be one of unavoidable failure upon experiment and trial, he proceeded: "This is not a complaint by a majority of proprietors against the governing body, but by a minority against the company itself, which they charge with a breach of faith toward them by stopping short in the execution of that purpose which induced them to become shareholders. To say that a majority of the whole body are satisfied with the dividends they are likely to receive, and are unwilling to risk more expenditure, is obviously no answer to the public, or to Parliament, which was induced to grant them powers by the promise of benefits much more extensively diffused."[1] Although the mandamus was afterward, upon the return to it by the company, held bad, that decision rested upon the ground that it contained no sufficient averment to the effect that the company had abandoned the design, or had willfully exercised an injurious option in taking land for the purposes of the railway, the court at the same time stating that the principles of interference announced in the former judgment remained untouched.[2] The writ of mandamus is equally accessible for securing the maintenance, by necessary repairs, of those public works, the ruinous state of which amounts to a public nuisance, and as such becomes punishable by indictment. In Rex v. The Bristol Dock Company,[3] where a mandamus had issued, directing the company to repair the banks of a canal, and the return denied their liability, the court said: "Those who obtain an act of Parliament for executing great public works are bound to fulfill all the duties thrown upon them. If this breach of contract causes a public nuisance also, that cannot dispense with the specific performance of the obligation contracted by them."

Nor are the courts of law less vigilant during the progress of these public works to confine the exercise of their statutory powers within the limits marked out for them, by strictly enforcing the conditions upon which they were granted. The London and Birmingham Railway Company in their return to a mandamus, issued on the prosecution of the inhabitants of Pinner, and commanding them to set out and make a good and sufficient road, with a foot-way and bridge, as

[1] Reg. v. Eastern Counties Railway Company, 1 Ra. Ca. 509.

[2] Reg. v. Eastern Counties Railway Company, 2 Ra. Ca. 260.

[3] 1 Ga. & Davis, 286.

required by their acts of incorporation, instead of a certain road which they had taken or diverted under the said acts, certified that they had caused a certain bridge to be erected for carrying the diverted road over the railway, extending the parapet walls on each side as far as necessary and no further;[1] and had made another road and footway, in lieu of the road diverted, which were good and sufficient; and "as convenient for passengers and carriages as the road and footway taken or diverted by them."[2] The prosecutors traversed all these statements, and on each of the three issues which arose upon this traverse the verdict was given for the Crown, it being ruled — 1, that every way made less convenient for passengers under any circumstances is a proper subject of inquiry, and that the convenience of passing with flocks and herds, as well as with carriages, was to be regarded; 2, that although the company was bound, by their act, to make the bridge of only fifteen feet clear width, they had no right to narrow the road one inch beyond the span of the arch over the railway; 3, that the extension of the parapet walls was not allowable. And where the Birmingham and Gloucester Railway Company, who had taken part of a turnpike road and erected thereon a bridge, sought in their return to excuse themselves from obeying a writ of mandamus, on the plea that they could not do so without purchasing land, whereas their compulsory powers for that purpose had expired, such excuse was held inadmissible, and the court observed that before the company availed themselves of their powers they should act strictly within those powers, yet the works were not begun until their powers were expired.[4]

The remedy by mandamus by no means supersedes the redress of public injuries of the kind above mentioned by indictment. An indictment being found at the quarter sessions, on the prosecution of the surveyors of highways, against the servants of the Leeds and Manchester Railway Company, for a misdemeanor, was removed by the defendants, by certiorari, into the Queen's Bench.

---

[1] The parapet walls had been carried to a considerable distance on each side of the road, reducing its former width, but leaving its actual width much more than fifteen feet.

[2] This they were bound to do by a specific clause in their act.

[3] Reg. v. London and Birmingham R. Co., 1 Ra. Ca. 317.

[4] To prevent abuse in the management of corporations, they are made amenable to the courts of justice. If they neglect or refuse to perform a positive duty involved upon them by their charter, a writ of mandamus may be issued to compel such performance; and if they attempt to exercise any power not conferred by the charter, a writ of *quo warranto* or *scire facias* may be issued, to compel them to desist from such usurpation. Walker's Introd. to Amer. Law, 210. Reg. v. Birmingham and Gloucester R. Co., 2 Q. B. (N. S.) 61.

It was charged against the defendants that they had diverted the highway and obstructed the old road by building a wall across it. The company had made a new road, but, as was asserted by the prosecutors, neither so convenient as the old road, nor as near thereto as might be, according to the requisitions of the act by which they were empowered. Much conflicting evidence was given at the trial on the question of convenience; the jury found the defendants guilty of a nuisance, and the Court of Queen's Bench, referring to the argument that the company or their servants were not indictable for doing a lawful act, however responsible for disobedience in not substituting a sufficient road, held that they had done what was legalized by their act upon a condition, which condition they had not performed;[1] and that the indictment was, therefore, sustainable.

Where the injury done by a company in the exercise of their powers is of a private nature, the remedy by mandamus (to which, indeed, or to the alternative remedy provided by the arbitration clauses, the complainant is in such cases confined) is equally accessible, and avails for the purpose both of ascertaining whether any damage has been done, and of compensating the party aggrieved.[2] Under an act giving them power to divert rivers and water-courses, the North Midland Railway Company had raised the level of a brook into which the sough or adit of a coal-mine had discharged itself, and thereby caused the water to flow into the sough, and inundate the coal works; upon an application for a mandamus to the company, commanding them to summon a jury to ascertain, and compensate the applicants for the damage sustained, which was opposed by the company, on the ground that they had restored the level, and that no damages had been incurred more than had occasionally occurred before the commencement of their works, it was held to be a question proper to be submitted to a jury to be summoned by them, whether any damage had been done;[3] and Littledale, J., observed: "They (viz.: the applicants) cannot recover by action for lawful acts; if part of the injury be done under the powers of a statute, and part not, they cannot have their remedy by action at law." So, in The Queen v. The Birmingham Canal Company,[4] the rule for a mandamus to summon a jury to assess damages, if any, arising by reason of a diminished supply of

[1] Reg. v. Scott and others, 3 Ra. Ca. 187.

[2] Before a mandamus can be granted, it seems that an ineffectual application must have been made to the company to summon a jury. The Rex v. The Brecknock and Abergavenny Canal Co., 8 Ad. & El. 222.

[3] Reg. v. North Midland R. Co., 2 Ra. Ca. 1.

[4] 4 Jur. 193.

water to the premises of the applicant was made absolute, the canal company having leave to return either that no damage had been done, or to issue their precept to summon a jury according to the terms of the rule.

And where the question turns upon a legal right, and prejudice may arise by the intermediate progress of the disputed works, the aid of the restraining power of the Court of Chancery may be obtained, until the parties having been placed in the fairest position to try the question have had their mutual rights duly ascertained in a court of law. Thus, where a bill was brought for an injunction [1] to restrain the defendants from carrying their railway across the plaintiff's private road, until they should have made in lieu thereof, for the use of himself and his tenants, a good and proper road by bridge or otherwise in a direct line, or otherwise, "according to the meaning of their act;" the company, it was stated, intended to stop up the direct road to the extent of 200 yards (thereby injuriously dividing the plaintiff's land), and to substitute a circuitous road of 600 yards. The Lord Chancellor premising that he would protect the property to be affected until the legal right was ascertained, said: "It is my intention to put the legal rights in a course of investigation. It is quite immaterial of what actual value the road may be, if it be one which by the act the plaintiff is entitled to have protected. The question is whether the road proposed to be substituted by the company, is such as comes within the provisions of their act." And an injunction was granted restraining interference with the old road, the plaintiff undertaking to bring an action against the company for taking the old road, the company admitting that fact, and the plaintiff, for the purposes of the action, admitting that they had finished the substituted road.

Where damage arises from the acts of railway or other companies, totally unwarranted by their statutory powers, it is clear that the remedy is by action of trespass, or upon the case, which last is the proper mode of proceeding where the injury has arisen from the negligence of the company.[2]

Of the formation of companies, and of the evidence by which a person is proved to be a shareholder.

SEC. 837. A company, so far as it is only a partnership consisting of a large number of persons having a joint-stock, and associated for the pur-

[1] Kemp v. The London & Brighton Railway Co., Ra. Ca. 495.

[2] Reg. v. Eastern Counties Ry. Co., 5 Jur. 365, and Jones v. Bird, 5 B. & A. 837, there cited.

pose of sharing profits, is formed in precisely the same manner as any other partnership, viz., by agreement; and after what has been stated in the preceding chapters it is unnecessary to dwell upon the formation of those companies which, being unincorporated and subject to no statutory provisions, have nothing to distinguish them from societies the nature and formation of which have been already explained.[1]

There are, however, other companies differing more or less from partnerships, and the formation of which requires notice. Moreover, the circumstance that the members of companies are constantly changing, renders it necessary to make a few observations on the transfer of shares, and on the evidence by which a person may be proved to be a shareholder.

In considering the formation of a company it is necessary to distinguish clearly between the formed company and the forming company. There is no difficulty in doing this when the company is incorporated or privileged by letters patent, for then the moment of its formation is accurately determinable; but where a company is a mere partnership, it is by no means easy to fix the time at which an agreement to form the company is replaced by a contract of present partnership. This subject has been already alluded to, and in the observations about to be made it will be assumed that the time of formation can be determined.

In order to explain the theory of the formation of a company, as distinguished from a partnership, it will be convenient to advert in general terms to the prospectus, the issue of scrip, and the transition of scrip into shares.

The first step in the formation of a company is the publication by its projectors of a prospectus, setting forth the nature and objects of the proposed company, the number and value of the shares intended to be created, and the amount of capital supposed to be required.

The public is invited to subscribe to the company thus proposed to be formed; in other words, persons are invited by advertisements, circulars, etc., to enter into an agreement to take shares in a company such as that described, when the same shall have been formed. Those who sign such an agreement become subscribers to the undertaking in

[1] The older cases on this subject must not be too much relied upon, the distinction between contracts of partnership and agreements to become partners not having been sufficiently attended to. Lawler v. Kershaw, Moo. & M. 93, with Vice v. Anson, id. 98. This section and the six following, are from Lindley on Partnership.

[2] As to when the formation of a company can be said to have been commenced, see Baker v. Plaskitt, 5 C. B. 262.

the proper sense of the word.[1] The prospectus issued to the public must, in the absence of evidence to the contrary, be regarded as the basis of the agreement into which each subscriber enters;[2] but if there is any difference between the nature and object of the company, as stated in the prospectus, and as described in a signed agreement, the latter must, in the absence of fraud, be regarded as settling the terms of the contract by which the parties to the agreement have consented to be bound.[3]

An application for shares is made to the persons named by the projectors. In form the application is generally a printed request for a certain number of shares or such smaller number as the managers may allot, and is signed by the applicant. If his request is granted, a letter of allotment is sent him in which he is informed that so many shares have been allotted to him, and that a certain sum, by way of deposit on each share, must be paid to the bankers of the company.

The application on the one hand, and the allotment on the other, form a contract based upon the prospectus; and binding on both parties, provided nothing is left open to either for future acceptance or rejection.

Very frequently, however, the letter of allotment is something more than a mere acceptance of the application made for shares, and when this is the case, the letter of allotment must be regarded as a new offer, which the applicant for shares is at liberty to accept or decline.[4] If he accepts it, and complies with the terms imposed by it, his letter of allotment is exchanged for what is called a scrip certificate, that is to say, an acknowledgment by the projectors of the company that he (or perhaps more commonly the holder) is entitled to a certain specified number of shares in the undertaking.

The certificate (which, if transferable by delivery, requires a penny stamp) represents a right to acquire and an obligation to take a share.[5] A scripholder, however, is not a shareholder, nor is he a partner with other scripholders, or with the projectors of the com-

[1] Thames Tunnel Co. v. Sheldon, 6 B. & C. 341, decided that a person who had signed nothing, but had applied for shares and had paid a deposit on those allotted to him, was not a subscriber within the meaning of an act incorporating the subscribers to a projected company.

[2] See Pulsford v. Richards, 17 Beav. 87.

[3] London & Continental Assurance Society v. Redgrave, 4 C. B. (N. S.) 524, and see Midland Great Western Rail. Co. v. Gordon, 16 M. & W. 804.

[4] Letters of allotment need not be stamped, see Vollans v. Fletcher, 1 Ex. 20; Moore v. Garwood, 4 id. 681.

[5] See Jackson v. Cocker, 4 Beav. 59; Clark v. Newsam, 1 Exch. 131, shows that to forge scrip is only a misdemeanor.

pany.[1] But a person who has agreed to take shares in a company when formed is not at liberty to withdraw from his agreement without the consent of the other parties to it, and, therefore, if the company is formed as contemplated, he may be made a shareholder therein, not only without any further consent on his part, but in spite of his expressed desire not to be one.[2]

On the other hand, as has been seen already, a person, who subscribes to a company proposed to be formed for certain purposes and upon certain terms, is not bound to take shares in a company formed for other purposes and upon other terms.[3] If, however, an act of Parliament is passed making persons shareholders in a company which they never agreed to join, it would not be lawful for any court of law or equity to decline to give effect to the act, and to hold that a person, expressly made a shareholder by the legislature, was not a shareholder in point of fact.[4]

Generally speaking, persons who subscribe to projected companies which are to be incorporated by act of Parliament or by charter, give the managers very extensive powers, and bind themselves to take shares in almost any company which the managers may be enabled to induce the legislature or the crown to incorporate, and which is not altogether of a different nature from that proposed. When this is the case, and a company is formed, the subscribers will be converted into shareholders, although the company actually formed differs in many respects, both in its object and constitution, from that to which they subscribed. In The Midland Great Western Railway Company v. Gordon,[5] a prospectus was issued for the formation of a company to construct a railway from Dublin to Mullingar and thence to Athlone. The directors were authorized to apply to Parliament for an act, and to do all that was necessary for forming a railway as proposed. Scrip certificates for shares were issued, and the defendant subscribed for ten shares. The directors obtained an act incorporating the company, authorizing it to make a railway from Dublin to Mullingar only, and to purchase a canal existing between Mullingar and Athlone, and to work such canal. The act provided that every one who should have

[1] Fox v. Frith, 1 Car. & M. 502. But this supposes scrip and shares to denote different things, which in scrip companies they do not.

[2] Kidwelly Canal Co. v. Raby, 2 Price, 93; Midland Great Western Rail. Co. v. Gordon, 16 M. & W. 804. As to the right of scripholders to have the money subscribed by them applied to the purposes for which they have subscribed it, see Bagshaw v. The Eastern Union Rail. Co., 7 Ha. 114, and 2 Mc. & G. 389.

[3] Galvanized Iron Co. v. Westoby, 8 Ex. 17.

[4] See Kidwelley Canal Co. v. Raby, 2 Price, 93; Scott v. Berkeley, 3 C. B. 925.

[5] 16 M. & W. 804.

subscribed in the undertaking or should be otherwise entitled to a share, and whose name should be entered on the register, should be a shareholder. The defendant had sold his scrip, but he was nevertheless registered by the company as a shareholder, and he was held to be a shareholder notwithstanding his contention that the company actually formed was materially different from that to which he had subscribed. This case was followed in Nixon v. Brownlow,[1] where a subscriber to a company, proposed to be formed under a specified name, for the construction of a railway between Galway and Kilkenny, and with a capital of a million, in shares of 25*l.* each, was held to be a shareholder in a company incorporated by act of Parliament under a different name, and authorized to make a railway from Kilkenny to Kuddagh, and to raise a capital of 225,000*l.*, in shares of 20*l.* each. In another case, subscribers to two different projected rival companies were held, after the amalgamation and incorporation of the two companies, to be shareholders in the united company.[2]

Again, where a banking company was projected with a capital of 1,000,000*l.* to be trebled if necessary, and the subscribers signed an agreement reciting that application had been made to the Crown for a charter, and nominating certain persons with power to arrange the terms of the charter in such manner as they should think necessary in compliance with the requisitions of the Crown, and to narrow or extend the objects of the company as might be necessary, it was held that a charter incorporating the subscribers with a capital of 644,000*l.* and power to increase it to 1,000,000*l.*, with the consent of the Lords of the Treasury, was one which the directors had authority to accept, and that the subscribers were bound by it.[3]

All these cases turn upon the contract into which the subscribers had entered, and upon the fact that they had bound themselves to take shares in a company more or less different from that originally proposed to be formed.

Whether any thing is required after the formation of a company to convert scripholders into shareholders, depends upon the constitution of each company; but speaking generally, a person entitled to scrip does not acquire the rights of an actual shareholder until his scrip certificates have been delivered up and exchanged for share certificates, and his name has been inserted upon the company's register of shareholders. After a company is formed, its scrip is usually called

[1] 2 H. & N. 455, and 3 id. 686.
[2] Cork and Youghal Rail. Co. v. Paterson, 18 C. B. 414.
[3] See Norman v. Mitchell, 5 De G. M. & G. 648, and 19 Beav. 278.

in, *i. e.*, the shareholders of the scrip are required to exchange their certificates for share certificates, and to do whatever else may be necessary to render them members of the company as distinguished from persons who have only a right to become members.

No person can, properly speaking, be said to be a member of or shareholder in a company so long as he has only a right to become such, nor can a person who has become a member or a shareholder be properly said to have ceased to be one so long as he has only a right to retire. These propositions, manifest in themselves, are supported by the authority of those cases in which it has been determined (1) that purchasers of shares are not shareholders until they have complied with all the formalities necessary to render them shareholders, as between themselves and the company; and (2) that shareholders who have sold their shares remain shareholders until they have complied with all the formalities necessary to enable them to prove that, as between themselves and the company, they are shareholders no longer. At the same time, a person may undoubtedly become a shareholder to most, if not to all, intents and purposes, without complying with all the formalities prescribed in that behalf by the statute charter or deed of settlement constituting the company, for if, without complying with those formalities, a person has been treated as a shareholder by the company, and has acted as a shareholder, both he and the company will be estopped from denying that he is a shareholder. So, if a shareholder, without complying with all the formalities prescribed for retiring, has in fact treated the company and been treated by it as if he were no longer a shareholder, both he and the company will be estopped from denying that he has ceased to be a member of it. This doctrine of estoppel is recognized both at law and in equity, but its application is attended with great difficulty, and involves the important question to what extent can prescribed formalities be disregarded by companies, *i. e.*, by persons who conduct their affairs and whose obvious duty it is to observe those formalities? Upon this question opinions have differed, and courts at law have been much more rigorous than courts of equity in declaring informal transactions null and void. The consequence of this has been that in courts of law the doctrine of estoppel by conduct has been applied with extreme hesitation and caution against companies, and that in those courts the non-compliance of prescribed formalities has frequently been held to be conclusive upon the question of membership or no membership, notwithstanding an apparent waiver of those formalities by all parties.

The importance of the present subject requires that some of the leading authorities upon it should be examined, particularly with a view to establish, if possible, some intelligible rule whereby to determine the question of membership or non-membership, in those cases in which the formalities prescribed by the instrument constituting a company have not been complied with.

Where there has been no waiver, real or apparent, of the prescribed formalities.

SEC. 838. If a person who is not a shareholder omits to do what is necessary to render himself a shareholder, and does not act and is not treated as if he were a shareholder, then it is clear that he remains a non-shareholder, although very little may be wanting to render him a shareholder. On the other hand, if a person who is a shareholder already, omits to do what is necessary to cease to be so, and does not act, and is not treated as if he had ceased to be a shareholder, it is clear that he continues to be a shareholder whatever intention he may have had of retiring and whatever preliminary steps he may have taken with a view to retire. In these cases that which is necessary to change an existing state of things has not happened, and as it is assumed that no conduct inconsistent with its continuance has to be taken into account, little difficulty can arise.

In the New Brunswick and Canada Railway Company v. Muggeridge,[1] a person who had applied for scrip, had had it allotted to him, had paid a deposit on it, and had agreed to accept shares in lieu of the scrip, was held not to be a shareholder, and so liable to calls, inasmuch as he had not signed the company's articles of association, which was a condition precedent to his becoming a shareholder. Upon precisely the same principle a purchaser of shares in a company is not a shareholder in it until he has made himself such by complying with its regulations as to the admission of members,[2] and, on the other hand, a shareholder who has sold his shares remains a shareholder until the purchaser has taken his place.[3]

Again, where shares are held by A in trust for B, and B has done nothing to render himself a shareholder, according to the terms of the company's regulations, and has never acted or been treated as a shareholder, he is not a shareholder, and is not liable to be sued by the company for calls, although A may be insolvent.[4]

[1] 4 H. & N. 160, affirmed on appeal, see 4 H. & N. 580. See, too, Carmarthen Railway Co. v. Wright, Fos. & Fin. 282; Galvanized Iron Co. v. Westoby, 8 Ex. 17.

[2] Hay v. Willoughby, 10 Ha. 242.

[3] See, for example, Midland Great Western Railway Co. v. Gordon, 16 M. & W. 804.

[4] Newry Rail. Co. v. Moss, 14 Beav. 64. Compare Goddard v. Hodges, 8 Tyrw. 209, and 1 Cr. & M. 33.

Where the prescribed formalities have been apparently waived, i. e., where they have not been complied with, but have been treated as complied with

SEC. 839. In these cases a new element is introduced, and has to be considered, viz., conduct inconsistent with the supposition that a previously existing state of things has not, in fact, been changed.

If a person is a member of a company, as between himself and the company, then, whether he is so by reason of his having become a member by complying with all requisite formalities, or by reason of the doctrine of estoppel, he ought, upon principle, to be deemed a member to all intents and purposes. And if a person is not a member, as between himself and the company, then, whether it is upon the ground that he never was a member, or upon the ground that he has ceased to be one, or upon the ground that he must be deemed to have ceased to be one, he ought, upon principle, to be treated as a non-member, unless, being a non-member, he has held himself out as a member to the person who insists that he is a member. It is very true that, as a general proposition, two persons may be estopped from denying, as against each other, that which either or both of them may deny as against a third party; but it is a novel doctrine to hold that one of two persons, who as between themselves are estopped from denying that they are partners, may, when sued by a creditor, show that no such partnership subsists. Nevertheless, the cases decided at law tend strongly to establish that a person who, in an action for calls, is estopped from denying that he is a shareholder, may, nevertheless, show that he is not one when sued by a creditor of the company.

It becomes necessary, therefore, to subdivide the cases bearing upon the present subject-matter of the inquiry, and to distinguish those in which the question of membership or non-membership arises between the company on the one part and an alleged member on the other, from those in which the question arises between the alleged member on the one part, and the creditors of the company on the other.

As between the company and an alleged shareholder.

SEC. 840. It has frequently been decided, even at law, that where a person has acquired the right to become a shareholder, and he has acted and been treated by the company as a shareholder, he is liable to calls at the suit of the company, although he may not have complied with all the formalities prescribed for the admission of members by the regulations of the company. Thus, in Burns v. Pennell,[1] the deed

[1] 2 Ho. Lo. Ca. 497.

of settlement of a company required certain acts to be performed by every purchaser of shares, before he could become entitled to exercise the rights of a shareholder. A purchaser of shares did not comply with the terms of the deed, but he, nevertheless, paid some calls made on his shares, and he was registered as a shareholder. It was held that he could not resist an action for further calls on the ground that he was not a shareholder. Again, in a case where an act of Parliament required that the shares in a company should be transferred by deed, and a person purchased shares without taking a proper transfer, but he, nevertheless, signed a paper describing himself as a shareholder, and procured himself to be registered as such, it was held that, in an action for calls by the company, he was estopped from denying that he was a shareholder.[1]

These authorities are sufficient to establish the doctrine of estoppel as applied against alleged shareholders. The application of the same doctrine as against companies involves the necessity of imputing to companies the irregular and unauthorized acts of their agents, and it is, therefore, attended with some difficulty. This will be apparent from the cases to which it is proposed now to refer.

As between an alleged shareholder and a creditor.

SEC. 841. Whether a person is liable, as a shareholder, to be proceeded against by the creditors of an incorporated or quasi-incorporated company, has been held at law to depend upon whether such person is or is not entitled by the regulations of the company to exercise the rights of a shareholder therein. The doctrine of estoppel has not at law been applied in these cases, so as to enable a creditor to proceed against a person who, though not a shareholder, has been treated by the company as if he were one, or so as to prevent a creditor from proceeding against a person who, though he has not ceased to be a shareholder, according to the company's regulations, has been treated by the company's officers as no longer a shareholder in point of fact.

In Moss v. The Steam Gondola Company,[2] a person who had acted as a director of a company was held not to be liable to creditors as a shareholder unless he had executed the company's deed, that being necessary to render him a shareholder as between himself and the company. Upon the same principle, where a married woman was a

[1] Sheffield, etc., Rail. Co. v. Woodcock, 7 M. & W. 574; see, too, Cheltenham Rail Co. v. Daniel, 2 Q. B. 281; Birmingham, Bristol, etc., Rail. Co. v. Locke, 1 Q. B. 256; London Grand Junc. Rail. Co. v. Graham, id. 271; Cromford, etc., Rail. Co. v. Lacey, 3 Cr. & J. 80.

[2] 17 C. B. 180; see, too, Bailey v. Universal Prov. Life Ass., 1 C. B. (N. S.) 557.

shareholder in company, and her husband was not entitled to act as a shareholder until he had complied with certain regulations, it was held that he was not liable to be proceeded against as a shareholder by creditors, as he had not complied with those regulations, although he had received his wife's dividends, and had voted at meetings, and otherwise acted as a shareholder.[1]

The principles thus recognized and acted upon in courts of law were pushed to their utmost extent in a late case, where a person who had, in fact, retired from a company, was sought to be proceeded against as if he were still a shareholder. The case in question is instructive, as it was litigated both at law and in equity, and was carried to the House of Lords; it, moreover, shows, better than any other, the different tendencies of the courts of law and equity to hold companies bound by the conduct of their managers and directors in matters of mere form. The case in question was decided at law under the name of Bosanquet v. Shortridge, in equity under the name of Shortridge v. Bosanquet, and in the House of Lords under the name of Bargate v. Shortridge.

In Bosanquet v. Shortridge, as it first came before the court, the plaintiff, who had obtained judgment against the public officer of a banking company, sought to enforce that judgment against the defendant, who was alleged to be a member of the company. The defendant had been a shareholder, but he had sold his shares to another person, and the transfer thereof to him was registered in the company's register. By one of the rules of the company no person was to be registered as a shareholder without the consent of a board of directors, and in this case no such consent had been obtained; and some time after the transfer had been registered the directors declared the transfer void, and they put the defendant again on the list and returned him as a shareholder. They did this for the express purpose of enabling the plaintiff, as a creditor, to proceed against him. It appeared that in point of fact transfers had been for years registered like the one in question, viz., without the observance of the formalities required by the company's deed. The Court of Exchequer held that the defendant had not ceased to be a shareholder, that he still was a shareholder within the true intent of the company's deed, and that he was, therefore, liable to be proceeded against by the creditors of the company.

---

[1] See Ness v. Angas, 3 Ex. 805; Ness v. Armstrong, 4 Id. 21.

[2] 4 Ex. 699.

In consequence of this decision, the suit of Shortridge v. Bosanquet[1] was instituted for the purpose, first, of having it declared that the plaintiff (*i. e.*, the defendant at law) was no longer a shareholder in the company, that his name might be erased from its books and not be returned to the stamp-office as if he were a member; and for the purpose, secondly, of restraining the creditor from proceeding to execution against the plaintiff. The Master of the Rolls held that after what had taken place the company could not insist that the plaintiff was still a shareholder, or that his transferee was not; and, it being established that the creditor was proceeding at the instigation of the company, an injunction was granted as prayed by the bill.

From this decree the creditor appealed to the House of Lords, but the decree was there affirmed upon the ground that the company could not take advantage of the non-observance by its own officers of formalities required by its own deed.[2]

The decision thus affirmed is in conformity with a prior decision made in Ireland in a case where it was held that a shareholder in a banking company had, as between himself and the company, ceased to be a member thereof, although he had retired irregularly, and that, having ceased to be a member as between himself and the company, he was not liable to be sued as a member by a creditor of the company instigated to sue him by its directors.[3]

These cases in equity are authorities for the application to companies of the doctrine of estoppel by conduct, and for the proposition that if the directors of a company in transacting such business of the company as they are authorized to transact, neglect to observe the formalities prescribed by the regulations of the company, and treat an informal act as a formal one, and thereby induce others to do the same, the company is estopped from afterward disputing the validity of what has thus been treated as valid by all parties. This proposition is also supported by many decisions upon the question, who are and who are not contributories under the winding-up act.[4]

The proposition thus established is perfectly consistent with the doctrine that companies are not bound by the conduct of their directors in matters as to which they are not the company's agents. The extent to which directors have power to bind their respective compa-

[1] 16 Beav. 84.

[2] Bargate v. Shortridge, 5 Ho. Lo. Ca. 297, decided by Lord St. Leonards, affirming the judgment of Sir John Romilly, Lord Cranworth not concurring.

[3] Taylor v. Hughes, 2 Jo. & Lat. 24.

[4] See Straffon's Executor's case, 1 De G. M. & G 576; Bagge's case, 13 Beav. 162, and other cases of the same kind, which will be examined when treating of the winding up of companies.

nies will be examined hereafter. It is sufficient to draw attention in the present place to the distinction between irregular acts of an authorized class, and acts which are altogether unauthorized, and to warn the reader not to conclude, from the decisions just adverted to, that a company is estopped from disputing the validity of acts done and treated as valid by its directors, if those acts are such as the directors have no authority whatever to perform on behalf of the company. It will be seen hereafter, first, that arrangements between shareholders and directors, whereby the former have been permitted to retire, have frequently been held invalid upon the ground that the arrangements were such as the directors had no authority to make; and, secondly, that in such cases the company is not estopped from showing that shareholders treated as having retired are, in fact, shareholders still.[1]

With reference to the question whether a person is or is not a shareholder in a company, the state of its register of shareholders is of considerable importance.

Shares in companies being marketable commodities, transferable from one person to another, some method of registration is indispensable, in order that the persons who are at any given time members of the company may be known. But a register of shareholders would be of little use if it were not admissible in evidence both for and against every person whose name is upon it, and it is, therefore, necessary not only to have a register, but to make it evidence in judicial proceedings. The simplest, and at the same time most just way of accomplishing this is to compel every member either to write his name in a book kept by the company, or to give some officer of the company a written authority to insert his name therein. Another, but much more arbitrary way is, to make it the duty of every company, or of some official, to keep a register of shareholders, and to make that register evidence against any one whose name may be upon it without the necessity of showing by what authority it was put there. The former of the modes is commonly had recourse to in mining districts where partnerships with transferable shares have long been known, but the latter mode has been adopted by the legislature and prevails in most companies governed by acts of Parliament.[2] A

[1] See Morgan's case, 1 M. & G. 225; Lawe's case, 1 De G. M. & G. 421; Daniel's case, 22 Beav. 42; Munt's case, id. 55; Bennett's case, 5 De G. M. & G. 284, and 18 Beav. 339.

[2] The making of companies' books evidence against their members is not a new device, see Bristol and Taunton, etc., Co. v. Amos, 1 M. & S. 569.

parliamentary register of shareholders thus becomes a most important document, for, speaking generally, unless a person is on it he is not entitled to the rights of a shareholder, whilst if he is on it he is subject to all the liabilities of a shareholder, unless he can show that his name ought not to have been on the list. The acts of Parliament relating to registers of shareholders are unfortunately numerous and differently worded, and it is necessary, before determining the effect of being on or off the register of a particular company, to examine the provisions of the act which applies to it.

One or two general rules relating to these registers regarded as evidence of membership may, however, be usefully adverted to:

1. The register or the official return, as the case may be, will be admissible, although it may be proved to be in some respects inaccurate or informal.[1]

2. A person whose name is inaccurately stated, but whose identity can be established, cannot escape liability as a shareholder on the ground of the inaccuracy,[2] and the use of a fictitious name only increases the difficulty of proving identity.[3]

3. The register or return is no evidence of the membership of a person except at and after the date at which the register or return becomes official.[4]

4. Unless the statute making the register or return evidence clearly and indisputably makes it conclusive evidence, the register or return will be *prima facie* evidence only of the truth of the statements in it, so that not only may a person whose name is in the register or return show that his name ought not to have been there, but a person whose name is not in it may be shown to have been in fact a member when the register or return became official.[5]

---

[1] Willis v. Murray, 4 Ex. 843. See as to banking companies governed by 7 Geo. 4, c. 46, Harvey v. Scott, 11 Q. B. 92; Field v. Mackenzie, 4 C. B. 705; Bosanquet v. Shortridge, 4 Ex. 699; and as to companies incorporated by statute Southampton Dock Company v. Richards, 1 Man. & Gr. 448; London and Grand Junc. Rail. Co. v. Freeman, 2 id. 606; London and Brighton Rail. Co. v. Fairclough, id. 647; Birmingham Bristol etc., Rail. Co. v. Locke, 1 Q. B. 256; London and Grand Junc. Rail. Co. v. Graham, id. 271; Bain v. Whitehaven Co., 3 Ho. Lo. Ca. 1; Dorritt v. Harding, 1 C. B. (N.S.) 524; Powis v. Harding, id. 551; Daniell v. Royal Brit. Bank, 1 H. & N. 681; Henderson v. Royal Brit. Bank, 7 E. & B. 356.

[2] Thompson v. Harding, 1 C. B (N. S.) 555; Clowes v. Brettell, 11 M. & W. 461.

[3] Arthur v. Midland Rail. Co., 3 K. & J. 204.

[4] Aylesbury Rail. Co. v. Thompson, 2 Ra. Ca. 668; Cheltenham Rail. Co. v. Price, 9 C. & P. 55. Compare Bosanquet v. Shortbridge, 4 Ex. 699.

[5] See 1. As to persons named in the register or return, Powis v. Butler, 3 C. B. (N.S.) 645, and 4 id. 469; Galvanized Iron Co. v. Westoby, 8 Ex. 17; Waterford, Wexford, etc., Rail. Co. v. Pidcock, 8 Ex. 279; Carmarthen Rail. Co. v. Wright, 1 Fos. & Fin. 282; Shropshire Un. Canal Co. v. Anderson, 8 Ex. 401; Bailey v. Universal Prov. Life Ass., 1 C. B. (N. S.) 557; Moss v. Steam Gondola

5. It follows from the last proposition that a company is not estopped by its own register. This was assumed by the Court of Exchequer in the Waterford and Wexford Railway Company v. Pidcock,[1] where the defendant was held not to be liable to calls because, though on the register, he had been placed there before he had become a shareholder, and because, notwithstanding the register, he was not entitled to exercise the rights of a shareholder.[2]

6. A person improperly registered as a shareholder in a company cannot be considered as holding himself out as a shareholder, merely because he takes no steps to have his name removed.[3] But as regards some companies, it is enacted that a person once properly registered as a shareholder, is to be deemed a shareholder so long as his name remains on the register.[4]

Where a company or its officers are required to keep a register of shareholders, it is their duty to keep such register accurately, and if they refuse to insert the name of a person entitled to be registered, or to erase the name of a person improperly registered, in either case, upon complaint being made to the proper tribunal, the company or its officers will be ordered to correct the register.[5] The Court of Queen's Bench will grant a mandamus to compel the company to insert a name improperly excluded,[6] and the Court of Chancery will grant an injunction to compel the company to remove a name improperly inserted.[7] A mandamus will not, however, go to compel a company to remove its seal from a register which it has sealed, although it may be shown that the register is incorrect, and that it has been sealed without authority.[8] Neither is a company bound to register complicated deeds of transfer, *e. g.*, marriage settlements, by which

---

Co., 17 C. B. 180; Birch's case, 2 De G. & J. 10. See 2. As to persons not named in the register or return, Rastrick v. Derbyshire, etc., Rail. Co., 9 Ex. 149; Prescott v. Buffery, 1 C. B. 41; Bank of England v. Johnson, 3 Ex. 598; Wolverhampton Waterw. Co. v. Hawkesford, 5 Jur. (N. S) 1104; Whittet's case, 2 De G. & J. 577. The question whether a person is a contributory or not in consequence of being on or off the register will be adverted to in a subsequent chapter.

[1] 8 Ex. 279.

[2] See, too, Shropshire Union, etc., Co. v. Anderson, 3 Ex. 401.

[3] See Bullock v. Chapman, 2 De G. & S. 211; Birch's case, 2 De G. & J. 10.

[4] See Ex parte Prescott, Mon. & Ch. 611; Harvey v. Scott, 11 Q. B. 92, 448. This subject will be reverted to hereafter.

[5] The register of companies governed by the acts of 1856–58 will be corrected if necessary in order to render a person a contributory or a non-contributory. See Whittet's case, 2 De G. & J. 577; Birch's case, id. 10.

[6] Norris v. Irish Land Co., 8 E. & B. 512.

[7] Taylor v. Hughes, 2 Jo. & Lat. 24; Shortridge v. Bosanquet, 16 Beav. 84. In Bullock v. Chapman, 2 De G. & S. 211, the court declined to interfere, the case not being sufficiently clear.

[8] Ex parte Nash, 15 Q. B. 92.

shares are assigned to trustees upon the usual trusts for the husband and wife and their children.[1]

A person entitled to be registered as a shareholder by a company can maintain an action against the company, or those of its officers whose duty it is to register him as a shareholder, if they wrongfully refuse to register him. In such an action it is no defense that the register is full, if it is so improperly;[2] and if the plaintiff complains that, in consequence of his name not being registered, his shares have been forfeited without notice to him, it is no defense that the forfeiture is a mere nullity, and that the plaintiff has, therefore, sustained no damage.[3]

It is to be observed that a person, asserting his right to be on the register, must prove his title to the shares in respect of which he claims to be registered,[4] and his right to be on the register;[5] and a mandamus will not be granted to a person who seeks to become a registered shareholder for the purpose of being troublesome.[6]

In addition to the evidence of membership obtainable from registers of shareholders, many companies are required by statute to give every shareholder, on demand, a sealed certificate of his ownership of the shares to which he is entitled.[7] The object of this is to enable a shareholder to prove that he is such, and particularly to enable him, upon a sale of his share, to prove his title to them to the satisfaction of a purchaser.[8] No person is entitled to demand a certificate of title to shares in a company until he has done every thing necessary to constitute himself a shareholder in the full sense of the word.[9]

Cost-book mining companies.

SEC. 842. Cost-book mining companies are sometimes represented as differing essentially from ordinary partnerships, but there is no authority for this statement; and it may be said with more truth that cost-book mining companies are mere partnerships governed by the general law of partnership, except so far as that law is excluded by local custom or by special agreement referring to and embodying

[1] Reg. v. General Cemetery Company, 6 E. & B. 415; Copeland v. North Eastern Rail. Co., id. 277.
[2] Daly v. Thompson, 10 M. & W. 309.
[3] Catchpole v. Ambergate, etc., Rail. Co., 1 E. & B. 111.
[4] Daly v. Thompson, 10 M. & W. 309.
[5] British Sugar Co., 3 K. & J 408.
[6] See Reg. v. Liverpool, Manchester, etc., Rail. Co., 21 L. J. Q. B. 284.
[7] 7 & 8 Vict., c. 110, ss 51, 52; 8 & 9 Vict., c 16, ss 11, 12; 19 & 20 Vict., c. 47, s 21.
[8] See upon this subject, Hare v. Waring, 3 M. & W. 362; Curling v. Flight, 6 Ha. 41, and 2 Ph. 613; Shaw v. Fisher, 2 De G. & S. 11.
[9] Wilkinson v. Anglo Californian Gold Co., 18 Q. B. 728: Stewart v. Ang. Cal. Gold Co., ib. 736.

such custom.[1] A cost-book mining company is formed by agreement. A number of adventurers who have obtained permission to work a lode, agree to form a capital, to divide that capital into a certain number of shares, and to distribute the shares amongst themselves. They appoint an agent commonly called a purser for the purpose of managing the affairs of the mine, subject to the control of the shareholders. They write in a book called the "cost-book," the agreement into which they have entered, and in this same book are inserted from time to time the receipts and expenditure of the mine, the names of the shareholders, their respective accounts with the mine and transfers of shares. The shares are transferable, and may be relinquished; they may also be sold for non-payment of calls; and these circumstances, rather than any other, distinguish cost-book mining companies from common partnerships.

It is sometimes represented, not certainly by lawyers, that the liability of shareholders in cost-book mining companies is limited; that both their past as well as their future liability is got rid of as soon as they have transferred their shares, and that they are in no case liable for the debts of the mine if they have paid the calls which may have been made upon their shares. All this is mere delusion, and although it is true that a shareholder can as between himself and co-shareholders get rid of his liability by transferring or relinquishing his shares,[2] there is no authority whatever for saying that the liabilities of the shareholders to creditors are governed by principles in any respect different from those which apply to ordinary partnerships.[3]

Whoever alleges that a cost-book mining company is in any respect governed by a local usage which excludes the application of the general law of partnership, must prove the existence of such usage, for the courts do not take judicial notice of what the cost-book principle is, and they invariably apply the general law of partnership to companies formed on that principle, unless it is proved that the application of such law is excluded as alleged.[4]

[1] See as to cost-book mining companies, the Readwin Prize Essay on the Cost-Book, by Tapping; Collier on Mines, 2. p. 111, *et seq.*

[2] Fenn's case, 4 De G. M. & G. 285; Mayhew's case, 5 id. 837; Bodmin United Mines, 23 Beav. 370; Birch's case, 2 De G. & J. 10; Lofthouse's case, id. 69.

[3] Shareholders in a cost-book mine were held liable to creditors for goods supplied in Tredwen v. Bourne, 6 M. & W. 461; Newton v. Daly, 1 Fos. & Fin. 26; see, too, Ellis v. Schmœck, 5 Bing. 521; Peel v. Thomas, 15 C. B. 714; Toll v. Lee, 4 Ex. 230.

[4] See Hawkin's case, 2 K. & J. 253; Bodmin United Mines, 23 Beav. 370; Fenn's case, 4 De G. M. & G. 285; Hart v. Clarke, 6 id. 232, and 6 Ho. Lo. Ca. 633; Sibley v. Minton, 27 L. J. Ch. 53, V. C. Kindersley. The purser cannot sue a shareholder for calls, Hybart v. Parker, 4 C. B. (N. S.) 209, unless the mine is within the jurisdiction of the Stannary court, and the purser proceeds in that court.

The question whether a person is a shareholder or not in a cost-book mining company must be determined in precisely the same way as the question whether a person is or not a member of an ordinary partnership.[1] The usual mode of proving that a person is a shareholder in a cost-book mine is by showing that he has signed the cost-book or an authority for the insertion of his name in it; and it has been said to be part of the cost-book principle that a register of shareholders should be kept, and that every member should sign either the book itself or an authority for the insertion of his name in it.[2] At the same time, a person clearly may, as between himself and third parties, incur the liabilities of a shareholder without signing the cost-book or any such authority as that referred to; nor is the writer aware that a person cannot be a shareholder as between himself and the other members in the absence of his signature to the cost-book or to an authority for the insertion of his name in it. Indeed there is reason for going further, and for denying that any such signature is essential, for an attempt to prove it to be so is reported to have failed, the evidence adduced amounting only to this, that it was *usual* for every member to testify his acceptance of shares by writing under his hand.[3]

In Vice v. Anson,[4] the court seems to have thought that a person could not be a shareholder in a cost-book mining company unless he acquired some interest in the mine, treating it as land, and that some deed conveying him an estate in the land was requisite. But this opinion cannot be supported, and it seems clear that shares in a cost-book mining company are transferable by entries in the cost-book, and that a person who is entered therein as a shareholder in respect of shares accepted by him is a shareholder, although no deed or writing at all has been executed.[5] Shares in cost-book mining companies are ordinarily transferred by a document in which the transferor acknowledges that he has transferred, and the transferee acknowledges that he has accepted the shares mentioned. This document is signed by both parties, is addressed to the purser, is sent to him by the transferee, and is the authority to the purser to register the transferee as a shareholder.[6]

[1] See Peel v. Thomas, 15 C. B. 714; Tredwen v. Bourne, 6 M. & W. 461; Thomas v. Clark, 18 C. B. 662.

[2] See Tippett v. Johns, Tapping's Essay, p. 187; Toll v. Lee, 4 Ex. 230.

[3] Northey v. Johnson, 19 L. T. 104, Q. B. 1852. That this is usual there can be no doubt; it is expressly required by the rules of most mines.

[4] 7 B. & C. 409.

[5] See Tippet v. Johns, Tapping's Essay, p. 187; Reynolds v. Bassett, Collier on Mines, 124, note; Northey v. Johnson, 19 L. T. 104; Toll v. Lee, 4 Ex. 230; Compare Curling v. Flight, 5 Ha. 242; 6 id. 41; and 2 Ph. 643.

[6] Toll v. Lee, 4 Ex. 230; Walker v. Bartlett, 18 C. B. 845. See as to parol transfers, Northey v. Johnson, 19 L. T. 104, Q. B.

It has been decided that an authority to the purser to insert a name in the cost-book does not require to be stamped,[1] and it is said to have been decided that the cost-book itself requires no stamp.[2]

Companies engaged in working mines within and subject to the jurisdiction of the Stannaries, need not be registered under the Joint-Stock Companies Acts of 1856 and 1857,[3] but they may be so registered, with or without limited liability, if there are seven or more shareholders.

Chartered companies.

SEC. 843. The Crown has at common law the power of incorporating by charter any number of persons who assent to be incorporated; and a chartered company is, therefore, formed as soon as a charter is granted to and accepted by two or more individuals, enabling them, alone or with others, to trade as a body corporate. The Crown, however, has no power to incorporate persons against their will:[5] nor after a corporation is once established can the Crown force a new charter upon it. A charter which has been confirmed by act of Parliament cannot be varied by the Crown;[6] but a charter which has not been so confirmed may, without being formerly surrendered,[7] be varied by a subsequent and inconsistent charter,[8] provided the new charter is accepted by the body corporate,[9] *i. e.*, by a majority of the members composing it.[10]

A chartered company is a corporation existing for the purposes for which it is created and no others; and those persons only are members of it who are rendered so by the charter, or by having been admitted in compliance with the charter and the by-laws made in pursuance of it.[11] The charter of a company is a law set to it and to the individuals composing it, and they have no power by any agreement amongst themselves to annul or legally do any thing at variance with their charter.[12] This subject will be adverted to hereafter.

---

[1] Walker v. Bartlett, and Toll v. Lee, *ubi supra*.

[2] Coll. on Mines, 153, note, citing Vivyan v. Mowatt, 8 L. J. Ex. 480, which, however, is a wrong reference.

[3] 20 & 21 Vict., c. 14, s 3.

[4] See as to charters, Grant on Corporations, pp. 9, *et seq.*

[5] Grant, pp. 13 and 18; Dr. Askew's case, 4 Burr. 2200, per Yates, J.; and see Rutter v. Chapman, 8 M. & W. 1.

[6] R. v. Miller, 6 G. R. 268; but see Royal Exch. Ass. Co. v. Vaughan, 1 Burr. 155.

[7] R. v. Larwood, 1 Salk. 168.

[8] Id.; and R. v. Haythorne, 5 B. & C. 410; Royal Exch. Ass. Co. v. Vaughan, 1 Burr. 155.

[9] Bull. N. P. 212, c.; R. v. Pasmore, 3 T. R. 240.

[10] R. v. Hughes, 7 B. & C. 708; in Ward v. The Society of Attorneys, 1 Coll. 370, an injunction was granted to restrain the majority from accepting a new charter.

[11] Dr. Askew's case, 4 Burr. 2200, per Yates, J.

[12] See The Society of Practical Knowledge v. Abbott, 2 Beav. 559. As to giving effect to the practice of the

A chartered company, being a corporation, is not a partnership, although the company may have gain for its object, and the members of the company may share profits.

A charter is not necessarily of any legal value, for it may have been obtained from the Crown by misrepresentation, or it may have been granted by the Crown in excess of its prerogative, and in either case the charter will be void. In a recent case a charter which had been obtained from the Crown by false and fraudulent statements was formally annulled by *scire facias*,[1] but although a charter which has not been thus annulled is to be treated as valid until the contrary is proved, there is apparently no rule to the effect that its validity is not to be disputed except in a formal proceeding instituted for the purpose of procuring its cancellation.[2] At the same time those persons who have accepted or acted on a charter and treated it as valid cannot, unless in a proceeding to annul it, object that it was obtained from the Crown irregularly, or by the misrepresentation of themselves or their fellow members, or of their predecessors.[3] Indeed, it is said, that neither those who have accepted a charter, nor their successors, can dispute its validity; but this is very doubtful.[4]

Charters are obtained by petitioning the Queen in council. The petition and draft of the proposed charter are left at the council office, and are then referred to the board of trade. The Colonial office, Foreign office, and India office are also referred to, if the proposed company falls within their departments. If it is determined that a charter shall be granted, it issues under the great seal.[5]

A charter may be surrendered to the Crown, but a surrender is of no effect unless accepted and enrolled in chancery.[6] After the surrender has been accepted and enrolled the corporation ceases to exist.[7]

Companies formed under letters patent.

SEC. 844. Letters patent and charters are both *Literæ Patentes* sealed with the great seal, and are, in fact, the same thing. But the crown is empowered by the Act 7 Will. IV, & 1 Vict., c. 73[8] to grant by letters patent to any company or body of persons, although not

members and allowing that to control the charter, see Somes v. Currie, 1 K. & J. 605.

[1] R. v. The Eastern Archipelago Co., 1 E. & B. 310; 2 id. 856, and 4 De G. M. & G. 199. See as to *sci. fa.* to repeal patents, 2 Wm. Saund. 72, *u*, *et seq.*

[2] Grant on Corp. 39, etc.

[3] See MacBride v. Lindsay, 9 Ha. 574.

[4] See Grant, 20–22.

[5] See Wordsworth on Joint-Stock Companies, p. 235; see, as to advertisements, 7 Will. IV, and 1 Vict. c. 73, s. 32.

[6] See R. v. Osbourne, 4 East, 326.

[7] Grant, 46.

[8] Repealing and replacing, 6 Geo. IV, c. 91, s. 2, and 4 & 5 Will. IV, c. 94.

incorporated by such letters patent, any privileges which the Crown might at common law grant to any company or body of persons by any charter of incorporation. Letters patent under this act are obtained on application to the Queen in council, and notice of the application must be inserted three times in the "London Gazette," and in one or more of the newspapers circulating in the country in which it is proposed that the principal place of business of the company shall be established, at intervals of not less than one week.[1]

Every company formed under this act is required to be entered into by agreement under seal, in which are to be specified the number of shares in the company, the name of the company, the names of its members, the date of its commencement, the nature of its business, the place or principal place where such business is to be transacted, and also the names of two or more officers to sue or be sued on behalf of the company.[2] Within three months after the grant of the letters patent, a return is to be made to the enrollment office of the Court of Chancery[3] of all the above particulars, and of the date of the letters patent,[4] and returns are required to be made of every change in the company's principal place of business, and of every change amongst its shareholders,[5] and in the officers by which it is to be sued.[6] These returns are directed to be registered and to be open to the inspection of any person upon payment of a small fee.[7] A certified copy of the return is made evidence both in civil and criminal proceedings.[8]

Companies formed under this act are not corporations, but are essentially partnerships. Their privileges depend on the letters patent obtained by them. The possession of a common seal is taken for granted in the act itself,[9] but there is nothing requiring the seal to be affixed to a contract, in order to bind the company, and the act is express that members of the company are to be liable to its debts and engagements, except so far as that liability may be limited by the letters patent.[10]

Who are to be deemed members is not stated, that question therefore must, it is conceived, depend in each case upon the provision of the deed of settlement, and of the letters patent by which the particular company in question may be governed, but when once a person has become a member, his liability as a member continues, until a

[1] 7 Will. IV, and 1 Vict., c. 73, s. 32.
[2] Id., s. 5.
[3] In the case of an English company, see s. 26.
[4] Id., s. 6.
[5] 7 Will. IV, and 1 Vict., c. 73, 7 to 10.
[6] Id., s. 13.
[7] Id., s. 17.
[8] Id., s. 18, see, too, ss. 20 and 21.
[9] See s. 27.
[10] See ss. 2–4 and 24.

return of the means whereby he has ceased to be one is registered.[1]

The act does not state with any precision how shares are to be transferred, but a transfer, by deed or writing, is evidently contemplated.[2]

Of the mutual rights of shareholders.

SEC. 845. The partners in a joint-stock company are of two classes; one consists of directors, trustees, and others, who are actively employed in conducting the concern; the other, of a number of persons who take little or no part in its management, and many of whom become shareholders for the sake only of obtaining a profitable investment for their money. The general conduct of the trade falls upon the directors, while the more particular transactions are usually managed by paid agents who are not shareholders. The funds and other property of the company are vested in the trustees.

When company is projected, but never formed.

SEC. 846. If a company be projected, but never come into actual operation, a person who has advanced his money upon the faith of the completion and continuance of the project is entitled to recover his deposit in an action against the directors for money had and received to his use.[3] Therefore, where a scheme for establishing a tontine was put forth, stating that the money subscribed was to be laid out at interest, and after some subscriptions had been paid to the directors, but before any part of the money was laid out at interest, the directors resolved to abandon the project, it was held that each subscriber might, in an action for money had and received, recover the whole of the money advanced by him, without deduction of any part toward the payment of the expenses incurred.[4] So, in a case where A, the purchaser of shares in a projected railroad company, had sold them to B, and the undertaking was afterward abandoned before any thing was done in pursuance of the project, it was held that B might recover the amount of the shares in an action against A.[5]

Similar relief may be had in equity, in cases where the projected company turns out to be a mere bubble, and the whole scheme was

[1] See s. 21.

[2] See ss. 8 and 9. The foregoing seven sections are from Lindley on Partnership.

[3] It has been held that if A sell B certain shares in a projected joint-stock company, and the undertaking is abandoned before any thing is done under it, B may recover from A the amount of the shares. Kempson v. Saunders, 4 Bing. 5.

[4] Nockles v. Crosby, 3 Barn. & Cres. 814; 5 Dowl. & Ryl. 751.

[5] Kempson v. Saunders, 12 Moore, 44; 4 Bing. 5. See Watkins v. Huntley, 2 Car. & Pay. 410.

concocted in fraud. Thus, in the well-known case of Colt v. Woollaston,[1] the defendant, Woollaston, who had procured a patent for extracting oil out of English radishes, assigned this patent to one Arnold, in trust for the contributors to the project, which he divided into five thousand shares, valuing every share at 20*l.*, in order to raise 100,000*l.* As an encouragement and security for the contributors, Woollaston likewise conveyed to Arnold and his heirs an estate which he had bought for 31,800*l.*, subject to a mortgage of 28,000*l.*, upon trust in the first place to pay off the mortgage and afterward to pay to him, Woollaston, 57,200*l* (in all 85,200*l.*); and as to the surplus which the estate would raise, it was to be for the benefit of the contributors. The project was to be called the "Land Security and Oil Patent," and was represented by the defendants to be a most advantageous project without any hazard, there being land security given for the benefit of the contributors. The project failed, and the contributors with some resentment, called for their money, upon which the projectors promised to return the money with interest, within six months, but afterward this was refused. The plaintiffs, who had each contributed 120*l.* for six shares a-piece, then brought their bill to be repaid these several sums, and the court granted the relief. Sir Joseph Jekyll said that this was an imposition, to propose the surplus of the value of an estate (which cost but 31,800*l.*), after 85,000*l.* charged upon it—more than double its value—as a security to the contributors who laid out their money upon this project, it was giving them moonshine instead of any thing real. It was no objection that the parties had their remedy at law, and might bring an action for moneys had and received for the plaintiff's own use; for, that in cases of fraud, a court of equity has a concurrent jurisdiction with the common law, matter of fraud being the great subject of relief there.

Modern cases in equity have been decided on the same principles. In Green v. Barrett,[2] the plaintiff was a shareholder in, and the defendants were the directors of a company called "The Imperial Distillery Company." The bill alleged that ten of the defendants caused a prospectus to be printed and distributed, stating the capital of the company to be 600,000*l.*, in 12,000 shares of 50*l.* each, naming certain persons as directors, etc., and promising that a settlement would be prepared, and that an act of Parliament would be passed to enable the company to sue and be sued in the names of its officers.

[1] 2 P. W. 154. See Stent v. Bailis, id. 217.

[2] 1 Sim. 45.

The bill further stated that the plaintiff, confiding in the truth and accuracy of the prospectus, and in the persons named as directors therein, and believing that it would be adhered to and carried into effect, purchased twenty shares, and paid his deposit of 100*l.* That the plaintiff afterward discovered that a small part only of the 12,000 shares was in fact disposed of; that the deposits on several of the shares which had been disposed of had not been paid; yet, that the defendants determined to proceed in the scheme, and advertised for the purchase of premises for carrying on the distillery business on an extensive scale. That the ten defendants before mentioned had, of their own sole assumed authority, chosen the two other defendants to be directors in the place of two persons who, although named in the prospectus as directors, refused to act; and that thereupon another prospectus was published by the direction of the defendants, which entirely, or in a great measure, differed from the first prospectus, upon the faith of which the plaintiff had paid his deposits. That no act of Parliament had been attempted or was intended to be obtained for the regulation of the company. That the plaintiff was informed, by means of a circular letter sent by order of the defendants, that they had purchased very valuable distillery premises, and he was required to pay the further sum of 100*l.*, being 5*l.* each on his shares. That the plaintiff, under the circumstances, had refused to pay this sum. The bill then charged that the directors had become directors for their own private emolument, and that a great number of shares had been allotted by them to themselves, and that they had sold them at very considerable premiums. That the money paid by the plaintiff had been obtained from him by fraud, and by means of misrepresentation, and for a purpose which had failed of effect; and prayed that the defendants might be decreed to repay to the plaintiff, with interest, the 100*l.* paid by him for the shares. To this bill two of the defendants demurred generally, but the demurrer was overruled. Sir John Leach: "Assuming the several statements in this bill to be true (which the demurrer does in form admit), I am of opinion that the plaintiff is entitled to recover back from the defendants the 100*l.* which he has paid, and that the only question is, whether a bill in equity will hold for that purpose, or whether he must have recourse to a court of law. I lay no stress upon the allegation that the second prospectus materially differs from the first, because such material difference is partly matter of law; and the plaintiff, not having stated the nature of that difference, has not enabled the court

to form any opinion upon the subject. Considering that in substance the allegations of this bill amount to this, that the prospectus for this undertaking was published, not with any intention to establish a company upon the principles there stated, but as a snare to persons who might unwarily become subscribers, and for the purpose of enabling the directors to make a profit by the sale of shares which they thought fit to assume to themselves, it does appear to me that the case is governed by Colt v. Woolaston, and, upon the authority of that case, I overrule this demurrer."

Every party suing must be named.

SEC. 847. As the relief given in cases of this nature arises out of fraud in the transactions stated in the bill, it has been held that the name of every party suing must appear on the record, and that one individual cannot be permitted to represent a class of persons having the same interests as plaintiffs. It has even been thought doubtful whether several persons can appear as ostensible plaintiffs in these cases, unless they became shareholders precisely at the same time and stand in other respects precisely in the same situation in regard to each other. In Colt v. Woollaston the bill was brought by two shareholders, but every circumstance of the case applied equally to both, and the bill was not demurred to; but, in the case of Jones v. Garcia del Rio,[1] Lord Eldon expressed a strong opinion on the subject. That was a bill filed by three persons on behalf of themselves and all other the holders of scrip or shares of the Peruvian loan, against the envoys of the Peruvian government, the contractor for the loan, and the bankers to whom the subscriptions for the loan were paid, praying an account, repayment of the moneys advanced, and an injunction to restrain the bankers from parting with the moneys, etc. The bill proceeded on the ground of fraud and misrepresentation, and of inability on the part of the envoys and the contractor to perfect the security which they had undertaken to give for the loan. The bill also alleged, and the answer of the contractor admitted, that the Peruvian government had not been acknowledged as an independent state by Great Britain. Upon motion to dissolve the injunction, Lord Eldon said that the plaintiffs, if they had any demand at all, had each a demand at law, and each a several demand in equity; that they could not file a bill on behalf of themselves and the other holders of scrip, and, as they were unable to do that, they could not,

[1] Turn. & Russ. 297.

having three distinct demands, file one bill; and upon that ground alone, his Lordship, without adverting to the question of public policy, dissolved the injunction.

It is, however, to be observed that, in the late case of Blain v. Agar,[1] of which the facts were very similar to those of Green v. Barrett, three shareholders were permitted to join as co-plaintiffs in a bill filed for the recovery of their deposits.

But, whether public companies shall be considered in the light of bubbles, and so they who are entrapped into them shall be allowed to have their remedy against the projectors, is a question which may depend on matters appearing in evidence long after such companies have been set on foot. So that no man who shall have so far interfered in the formation of a company as to be entitled to share the profits, if there be any, shall, on the prospect of failure, be permitted, of his own free will and pleasure and without consideration, to withdraw himself from the undertaking. In the case of the Kidwelly Canal Company v. Raby,[2] the defendant, Raby, was one of the original subscribers to proposals for uniting for the purpose of improving the harbor of Kidwelly, and making a canal, etc., and of obtaining an act of Parliament as the foundation of the undertaking. In the progress of the scheme, he attended various meetings as chairman, and voted, and otherwise took an active part. Afterward, at a meeting of the committee of the House of Commons, during the progress of the bill, the defendant, disapproving of the proceedings, signified that he should withdraw his subscription, and desired that his name might not be inserted in the bill, to which the chairman of the committee assented; and, when the act passed, his name was, in fact, omitted. He, nevertheless, attended a meeting of subscribers in November following, and seconded a motion for the appointment of a clerk. On this evidence, it was held at *nisi prius* that the defendant was not at liberty to withdraw his name without the consent of the other subscribers; and, therefore, that he was liable in an action brought against him to recover the amount of six calls. And this opinion was afterward confirmed by the Court of Exchequer.

We have already observed that they who sign the deed of settlement are, to all intents and purposes, partners. They, therefore, who have subscribed the deed of settlement and wish to retire from the

[1] 2 Sim. 289. In the case of Thompson v. Powles, decided, on appeal, by Lord Brougham, his Lordship took occasion to express his disapprobation of the whole of this class of cases in equity.

[2] 2 Price, 93.

concern, must conform to the stipulations of the deed; which usually provides that any proprietor shall be permitted to retire upon payment of a certain sum in respect of his share, and upon giving notice to the directors.

Supposing the company to have been properly and legally formed, we have next to consider the rights and remedies as between the shareholders, either by virtue of the deed of settlement, or by virtue of the general law of partnership. And first as to the rights and remedies under the deed of settlement.

The deed of settlement is a covenant made between a few of the shareholders chosen as trustees for that purpose, and the others; by which each of the latter covenants with the trustees, and each of the trustees covenants with the rest of the shareholders for the due performance of a series of articles which are thereafter specifically set forth. These articles point out the duties of the directors, trustees, and auditors; the powers of general meetings of the proprietors to make further calls on the deposits; the limitations under which proprietors are to hold their property in the concern — namely, as regards the number, the power of assignment, and the mode of descent of each share; the remedies given to the directors for breaches of covenant; and a variety of other provisions, which are better understood by a perusal of the instrument itself, and which, therefore, it will be unnecessary to mention more in detail in this place.

Whether a company be constituted by deed only, or with the additional security of an act of Parliament, it is of the utmost importance to the safety of the adventurer that the provisions of the act or the deed should be carefully and minutely set forth. The courts, however, will endeavor to construe the several clauses of these documents in such manner as to guard, as far as possible, the interests of the public. Therefore, where an act of Parliament provided that the whole of the estimated expense of the works of a projected company should be subscribed before any of the powers and provisions given by the act should be put in force, it was ruled that the company could not maintain an action of debt for a call on shares until every signature had been affixed to the deed of settlement.[1]

The same principles appear to have guided the Court of King's Bench in the case of the Thames Tunnel Company v. Sheldon.[2] By

[1] Norwich and Lowestoft Navigation Company v. Theobald, 1 Mood. & Malk. 151.

[2] 6 Barn. & Cres. 341; 9 Dowl. & Ryl. 278. And see Stratford and Moreton Railway Company v. Stratton, 2 B. & Ad. 519.

an act of Parliament passed for making a tunnel under the Thames, the company of proprietors were enabled to raise a sum of 200,000*l.* for the purpose of making the tunnel; and it was enacted that the persons who had subscribed, or who should thereafter subscribe or advance any money toward making the tunnel, should pay the sums by them respectively subscribed, at such times and places, and in such manner as should be directed by the directors; and in case any of such subscribers should neglect to pay the same at the time and place and in manner so required for that purpose, the company, or their directors, were empowered to sue for and recover the same. By another section, reciting that the probable expenses would amount to 160,000*l.*, and that the sum of 140,000*l.*, being more than four-fifth parts of such expenses, had already been subscribed for defraying such expenses by several persons, under a contract binding them, their heirs, executors, and administrators, for payment of the several sums so subscribed by them respectively, it was enacted that the whole sum of 160,000*l.* should be subscribed in like manner before any of the powers and provisions given by that act should be put in force. The defendant purchased eight shares in the company and paid his deposits thereon. Before the passing of the act the contract was left at the company's office for the signatures of the subscribers, but was not signed by the defendant, although his name was mentioned at the foot of it as a subscriber for eight shares, and a space left opposite each subscriber's name for his signature and seal thereto. A short time after the act of Parliament had passed, when the company were procuring additional signatures and seals to the contract for completing the subscription to 160,000*l.*, the defendant, on being then applied to, refused to execute the contract, alleging that he had sold his shares in the concern, but no evidence of this fact was given. The works authorized by the act being in progress, calls became necessary and this action was brought against the defendant for the amount of two calls on his eight shares. The Court of King's Bench held that the defendant was not liable; that the word "subscriber" in the act did not apply to all those who had already advanced money, but only to those who, by signing the contract, had stipulated that they would make payment.

The same principles must likewise be applied in adjusting the internal arrangements of the company, according to the terms of the deed. In Moore v. Hammond,[1] it was provided by the deed of settlement

[1] 6 Barn. & Cres. 456; 9 Dowl. & Ryl. 482.

that the directors of the company should, without notice or summons, meet together at their office once in every week on and at such day and hour as they should from time to time agree upon, and also at such other times as they should from time to time be convened in manner thereinafter mentioned or adjourned to, and that three directors should be a board. By another clause any three directors were empowered at any time to call a special board or meeting by giving under their hands in writing three days' notice to the other directors of the company, which notices were to be countersigned by the secretary, and to be sent to him two days prior to the time appointed for such meeting. It was held that in order to constitute a good weekly meeting without notice or summons the day and hour of meeting must have been previously agreed upon by the directors, and, therefore, that a meeting of three directors without previous agreement on their part to meet on any fixed day or hour was not a meeting duly convened within the meaning of the deed of settlement. Lord Tenterden: "It is of great importance to a partnership consisting, as this does, of a large number of persons who place the management and control of their affairs in a small number, and by the deed by which they so place their affairs under the management of that small number, provide certain regulations for the conduct of that small number, by whatever name they may be designated, that the regulations regarding the meetings of those intrusted with the management of their affairs should be held in pursuance of the directions of the deed. The deed in question provides for two classes of meetings of the directors, the one to be held without summons or notice, the other to be held upon summons. The class that may be held without summons or notice are weekly meetings, and they are to be held at such day and hour as the directors shall from time to time agree upon. Supposing, therefore, the directors at any meeting to have come to a resolution that there should be a meeting held on any one specified day in the week, a meeting on that day, without notice or summons, would be a good meeting within the provisions of this deed, but unless the directors have previously agreed upon the day on which the meeting shall be held, it appears to me that a meeting on any other day is not a good weekly meeting within the meaning of this clause. If it were held to be so, it would be in the power of any three of the directors, the chairman or deputy chairman being one, to hold a meeting to make an order for payment on shares, or to do any other act whatsoever regarding the affairs of the company, without any notice

to the proprietors. I cannot think that such was the meaning of this clause; but that a meeting cannot be legally held unless by notice, or unless the directors have previously agreed to meet at a certain time and place in order that every director may know the day on which such business will be transacted, and that he may have an opportunity of attending."

To constitute a person a legal officer of the association, all the terms of the appointment as agreed upon either by the proprietors in general or by the directors, as the case may be, must be complied with. In a case where there was a general resolution of the directors (having powers for that purpose), that no act should be binding unless four directors were present at any meeting, and an agent was appointed by power of attorney given by the trustees of the company, under the sanction of a meeting at which three only of the directors were present, it was ruled that such appointment was invalid.[1]

The justice and expediency of these decisions is manifest when we consider the extent of liability which the law of England imposes on the members of the company, and the confidence with which the majority of those members place their most important interests in the hands of a few. It has been well observed that though the formal constitution of a joint-stock company may invest the body of its members with powers of superintendence and control, in practice they are inevitably passive. They contribute capital and receive accruing profits in proportion to their respective interests; but the conduct of the enterprise is abandoned to a few of the partners or delegated to hired agents. These acting partners or agents represent the company in its dealings with strangers and the company, or the great and passive majority of its members, must trust to their honesty and discretion; there being little security besides that they will not abuse their power of binding their constituents."[2]

Deed of settlement, what it should set forth.

SEC. 848. The mutual rights and remedies between the company and individual shareholders are, or ought to be, set forth and provided for in the *deed of settlement*, or in such deeds as every shareholder is bound to execute on becoming a member of the company. All who act as covenantees for the company must of course be made plaintiffs in an action on any of the covenants contained in these deeds.

[1] Ducarry v. Gill, 1 Mood. & Malk. 450. However, as between an officer of the company and the company, it will not be presumed that any acts done by the directors of the company in favor of the officer are irregular. Clarke v. Imperial Gas Co., 4 B. & Ad. 315.

[2] Parl. Hist. Sess. 1825, p. 711.

It has sometimes been matter of doubt how far, consistently with the general law of partnership, actions of covenant can be maintained by one shareholder of a company against the company. It is conceived that, even in the case of ordinary partnerships, actions of covenant may be maintained between partners, except, perhaps, where the damages, when recovered, are payable to a firm or partnership fund. *A fortiori*, therefore, they are maintainable between the members of a joint-stock company. In Bedford v. Brutton,[1] it was held that an action of covenant was maintainable by a shareholder against the trustees of a company, upon their express covenant to pay a sum of money to the plaintiff, although there was a remote right in the company to contribution in respect of the damages to be recovered in the action. It appeared that the plaintiff had demised land to the defendants as trustees of a building company, of which the plaintiff was a member, for the purpose of building a certain number of houses, and that by that deed the defendants covenanted to pay the plaintiff rent. By another deed, being the deed of settlement of the company, and which recited that the buildings were to be paid for out of a fund to be raised by the subscription of the members, the plaintiff and the other members covenanted with the defendants that each of the members would, when called upon at their general meetings, to be held quarterly, do and perform all such acts as might be necessary for indemnifying the defendants from all loss and damage which they might sustain in the execution of the trusts. The plaintiff having brought his action on the covenant for rent, the defendants pleaded, amongst other matters, that the plaintiff and the other persons named in the last-mentioned deed were jointly liable with the defendants to pay the damages, if any, to be recovered by reason of the alleged breach of covenant, and an argument founded on this plea was offered on behalf of the defendants to the Court of Common Pleas. That court, however, held that the plaintiff had a right to recover, and Tindal, C. J., in delivering the judgment of the court said, that the answer to the objection was, that the damages were in the first instance to be borne by the defendants, who were to be indemnified at a *future* and *uncertain* time in such manner as the members of the society at a general meeting should direct. That the rent was reserved at certain stipulated times while the meetings of the society were to be held quarterly, and that it never was intended that the landlord should wait till the quarterly meeting, when the day of

[1] 1 Bing. N. C. 399; 1 Scott, 245.

payment occurred before it. His Lordship added that this case differed from that of a common partnership in two important points, namely, that the damages, when recovered by the plaintiff, did not go to any partnership fund, but were his own separate property, and the damages were not to be paid out of any partnership fund, but by the trustees on their personal contract.

In the case just cited the court adverted to that of Andrews v. Ellison,[1] as a strong authority to show that an action of this nature is maintainable. There, in an action of covenant upon a policy under the seal of the defendants, it appeared upon the record that the defendants were jointly interested with the plaintiffs in the funds which were ultimately to satisfy the plaintiff's loss by fire, and it was held that the defendants were liable on their express covenant by which they engaged that the plaintiff should be entitled to a remuneration out of the society's funds in case of loss by fire.

It seems that an action is maintainable on the part of the company against an individual member, for goods supplied by the company for that member's private use. This being the case, it is clearly competent for the proprietors in general to agree that all actions for goods sold and delivered to members of the company shall be brought in the name or names of one or more members of the company, exclusively. But if the action be brought in a manner inconsistent with the terms of the stipulation, the plaintiffs will be nonsuited. In the case of Davies v. Hawkins,[2] a number of persons formed themselves into a company for brewing ale, and entered into a deed, by which it was agreed that the conduct of the business should be confided to two persons, and the trade carried on in their names, and that they should be trustees for the company, so far that the right of action for goods delivered should be in them, and that all actions for ale delivered should be brought in their names, and that all ale delivered should be considered as their property, and that the directors, for the time being, should have power to regulate the general business of the company, and that general quarterly meetings of the members should be holden. It was held that one person only could not be appointed at a general quarterly meeting, upon the recommendation of the directors, to conduct the business in place of the two persons originally appointed under the deed, unless such alteration was made by the consent of, or after notice to all the subscribers, and, therefore, that the plaintiff, who had been so appointed without the consent of, or notice to the

[1] 6 Moore, 199. [2] 3 Mau. & Sel. 488.

defendant, who was an original subscriber, and executed the deed, could not maintain *assumpsit* for ale of the company delivered to the defendant.

We have seen that in common cases of partnership, a partner is precluded from assigning his interest to a stranger, so as to make the stranger a partner. To prevent this rule of law from affecting the shareholders of a trading company, there must be a provision in the deed of settlement, enabling each shareholder to assign or transfer his shares. But, as these shares must not be made transferable entirely at the will of the holder, there must also be provision for giving due notice to the directors of the intended transfer or assignment.

Upon the death of a shareholder, although his legatees or next of kin will be beneficially entitled to his interest in the company, yet neither they nor his executors will be entitled to stand in his situation as a partner, unless permitted to do so by the deed. Moreover, it may be convenient to stipulate that, as between the several parties to the deed (or those claiming under them) and the company, the executors of a deceased partner shall be the only persons considered as standing in the situation of the deceased, even with respect to the mere power of disposing of the testator's shares.

In some cases the Act of Interpleader [1] will be useful in determining the rights of parties claiming, under distinct interests, against the shares of a deceased proprietor. The act has been put in force in a case where the solvent executors of a shareholder, on the one hand, and the assignees of a bankrupt executor, on the other, claimed certain dividends due on the testator's shares in a public company.[2]

The general law of partnership applies when deed of settlement does not provide remedies.

SEC. 849. In matters which might have been, but are not provided for by the deed of settlement, the general law of partnership must prevail. Therefore, unless there be a stipulation to the contrary, every proprietor has a right to have free access at all times to the books of the company.[3] And although, in some cases, this right is restricted by a stipulation in the deed, yet such a stipulation will not deprive the shareholder of a right to the production of the deeds in a suit brought by him against the company.[4]

In matters which are beyond the control of the parties themselves,

[1] 1 & 2 Will. 4, c. 58.
[2] Cooper v. Smelting Lead Company, K. B., East. T. 1832.
[3] Baldwin v. Lawrence, 2 Sim. & Stu. 18.
[4] Hall v. Connell, 3 You. & Coll. 707.

and which are not regulated by admitted custom, it seems almost unnecessary to say that the general rules of partnership must be applied.

In referring to cases of actions between shareholders, in which the courts have acted upon that general principle of partnership, that one partner cannot maintain an action against his copartner on a contract relating to the partnership, we may notice in the first place those which have been brought by attorneys, surveyors, etc., being also shareholders, against the company for work and labor done in establishing the company. On the general principle above stated, these actions are not maintainable,[1] and, therefore, in Goddard v. Hodges,[2] a solicitor, who had been employed by a company, prevailed upon a member to become the trustee of his shares, in order that he might maintain his action against the company for work and labor done; but the Court of Exchequer held, for the reasons which have been already mentioned, that such action could not be maintained. Where, however, it was provided by an act of Parliament establishing a company that all the money to be raised should be laid out and applied in the first place in paying and discharging all costs and expenses incurred in applying for, obtaining and passing the act, and all other expenses preparatory or relating thereto, it was held that a party, though a member of the company, might sue them for his time and trouble, and money expended in obtaining the act.[3]

Other instances of the application of the general rule to joint-stock companies may here be adverted to. In Neale v. Turton,[4] the plaintiff brought his action against the members of the London Patent Steam Washing Company, on two bills of exchange, which were drawn by him on "The Directors of the London Patent Steam Washing Company," and accepted for the directors of that company by their secretary. The bills were as follows: "Three months after date, pay to me, or my order, the sum of 115*l.*, for value received,—William Henry Neale. Accepted, payable at the Bank of England, per procuration of the directors of the London Steam Washing Company—Isaac Buxton." The plaintiff was a holder of twenty shares in the company. It was objected that he was a partner in the concern, and, therefore, could not sue his copartners; and the Court of Common Pleas held the objection valid. Best, C. J.: "The bills are drawn on the directors of the company, and accepted for the direct-

[1] See Holmes v. Higgins, *ante*.
[2] *Ante*.
[3] Carden v. General Cemetery Company, 5 Bing. N. C. 253; Tilson v. Warwick Gas Light Company, 4 B. & C. 962.
[4] 4 Bing. 149; 12 Moore, 365.

ors. They are the agents of the company, and accept as agents of the company. The case, therefore, is that of one partner drawing on the whole firm, including himself. There is no principle by which a man can be, at the same time, plaintiff and defendant. We are clearly of opinion that these bills, being drawn on the directors, are in effect drawn on the company, of which the plaintiff is himself a member. He cannot be, at the same time, drawer and acceptor, and the rule, therefore, which has been obtained for entering a nonsuit, must be made absolute."

The case of Teague v. Hubbard [1] is another important authority on this subject. That was an action by the plaintiff, as indorsee, against the defendant as drawer of two bills of exchange. The plaintiff was a shareholder and managing director of the Cornish Tin-Smelting Company. The defendant was a shareholder, and likewise was the company's agent for the sale of their tin in London, which he sold upon a *del credere* commission. The defendant, having sold tin for the company to one C, drew bills upon C for the amount of the tin sold, in the following form: "Two months after date, pay to my order 200*l.*, value received,—Zach. Hubbard, for Cornish Tin-Smelting Company." [2] The bills being accepted by C, were indorsed by the defendant to the actuary of the company, and by the actuary to the plaintiff. Upon this evidence, the Court of King's Bench held that, as the plaintiff and defendant were both members of the joint-stock company, and, therefore, joint contractors, the defendant was not liable to the plaintiff in an action on the bills.

During the argument of the preceding case in the Court of King's Bench, Lord Tenterden suggested that although the plaintiff could not sue the defendant on the bills, yet it might be a question whether the defendant, as one of the firm, having guaranteed a debt to the firm, and having received part of it from the debtor, the other partners might not recover against him for the money so received. "May not," he added, "the plaintiff say that the money received by the defendant, on account of the bills, was received by him not as a partner, but in his individual character, and for the purpose of relieving himself, *pro tanto*, from his liability to the firm upon his

[1] 1 Man, & Ryl. 369; 8 Barn. & Cres. 345; Dans. & Lloyd, 118.

[2] The form of the drawer's signature seems not to have been noticed by the court. Suppose the drawer had drawn and indorsed in his own name only, would the decision have been the same? —Qu.; and see D. Best, C. J., Neale v. Turton, 4 Bing. 151; also, arg. Taddy, S. C.; Preston v. Strutton, *ante*.

guarantee? Though the plaintiff may not be entitled to recover on the bills, by reason of the partnership, may he not recover the sum actually received by the defendant, the receipt of that sum not being a partnership transaction?" Upon further consideration, however, the court were of opinion that the defendant must be considered as having received the money not in his individual character, but in his character of partner; and, consequently, that he was not liable on the counts for money had and received.

We may observe that the transactions in the several cases just mentioned occurred in the course of conducting the affairs of the company. But with regard to insulated transactions, though possibly arising out of the affairs of the company, an action may be maintained between proprietors. And it seems that where goods are supplied by the company to an individual member, for his private use, that will be regarded as an insulated transaction, for which an action for goods sold and delivered will lie by the company, or their agents, against such member.[1]

When shareholders may proceed in equity against directors.

SEC. 850. When the conduct of the directors or managers of the company has been fraudulent, or in any other respects detrimental to the shareholders in general, they may file a bill in equity for relief. On occasions where relief has been sought in equity against the acts of the directors, great difficulty has arisen as to the form of the suit. In some cases it has been said that every individual shareholder should be made a party; in others, that a few shareholders may be made parties, provided it be averred that they represent a class having a common interest. The general distinction seems to be that where a common benefit is to be enforced against a few individuals, members of the partnership, as, for instance, against the directors, or against a common fund, the court will allow some of the shareholders to sue on behalf of themselves and others; but where the court is required to act in a manner which may be against the interest of any of the parties, other than those who are specially charged, it cannot proceed, unless all the parties are on the record.[2]

As instances of bills being allowed to be filed on behalf of a class of persons to enforce a common benefit, we may mention the cases of Cockburn v. Thompson,[3] and Hichens v. Congreve.[4] In the former

[1] Davies v. Hawkins, 3 Man. & Sel. 488.
[2] 2 Sim. 376.
[3] 16 Ves. 321.
[4] 4 Russ. 562; and see Society of Practical Science v. Abbott, 4 Jurist, 453.

of these cases the bill was filed by several persons on behalf of themselves and all others, the proprietors of a charitable institution, against the solicitor and the bankers of the institution, praying an account of moneys received by the defendants, and that the institution might be dissolved. In the latter case the bill was filed by five persons, on behalf of themselves and all other shareholders of an iron and coal company, for the purpose of compelling the defendants to refund moneys alleged to have been withdrawn by them from the stock of the company, and applied to their own use. To these cases may be added that of Taylor v. Salmon,[1] in which it was held that a bill might be sustained by the directors of a mining company on behalf of themselves and all other the shareholders against their agent, who was also a shareholder, and a third person, to obtain the benefit of a contract entered into by the agent with such third person, without making the other shareholders individually parties to the suit.

It may be remarked that, although in Cockburn v. Thompson the bill sought to have the affairs of the whole concern wound up, it was not a case of trading partnership; and in Hichens v. Congreve the prayer of the bill did not extend to this species of relief. In neither of these cases, therefore, nor in that of Taylor v. Salmon, could the interest of the absent parties be prejudiced.

But where in a trading partnership the bill seeks to have the whole affairs of the partnership wound up, the case has been considered to be within the second branch of the distinction above adverted to, namely, as involving the interest of other parties besides those who are specially charged; for here all parties are equally accounting parties, or, at all events, equally interested in having the accounts taken. In cases, therefore, of this nature it has been held that all the shareholders, however numerous, must be made parties to the suit.

Upon these considerations the case of Long v. Yonge[2] was decided. There the bill was filed by forty-seven persons on behalf of themselves and all other the members of, and partners in the Norwich Equitable Insurance Company, against the survivors of the original directors and trustees of the company, and certain other members of the company who had been appointed by them in the room of the deceased directors and trustees, and also against the executors of the late sec-

[1] 4 Myl. & C. 134; and see Gray v. Chaplin, 2 S. & S. 267.

[2] 2 Sim. 369, and see Davis v. Fisk, Farren on Insurance, 128.

retary or registrar, praying for a dissolution of the establishment in consequence of the misconduct of the trustees and secretary, and that the necessary accounts might be taken. Sir Lancelot Shadwell allowed the demurrer on the ground that all the shareholders should have been made parties, and his Honor, in the course of the argument, distinguished the case before him from that of Cockburn v. Thompson, observing that in that case the suit was, in effect, a suit against Thompson alone, and the question was whether he could be heard to say that the society should not proceed against him, unless all the members were made parties; if the question had been *bona fide* raised, whether the partnership should be dissolved or not, and some members of the society had been made defendants who insisted that it should not be dissolved, then the question which his Honor had to determine would have arisen in that case also.

So in Evans v. Stokes,[1] where the bill was brought by three persons on behalf of themselves and all other members of the French Brandy Distillery Company, except the defendants, against the directors and two shareholders who were not directors, suggesting that a dissolution had been brought about by the fraud of three of the defendants, and praying that the partnership affairs might be wound up, Lord Langdale, M. R., allowed an objection taken by the defendants, that all the shareholders were not partners; and his Lordship observed that it was obvious that a suit where all the accounts of the partnership were to be taken, and the rights of all the partners were to be determined, as between themselves and under the various circumstances in which they stood in relation to each other, some of them for instance having paid their calls, and others having omitted to do so, could not be prosecuted in the absence of any of those partners.

But notwithstanding these last-mentioned decisions, which are unquestionably founded on the true principles of equity pleading, it is apprehended that the court would be disposed to allow some relaxation in cases where an absolute failure of justice would otherwise ensue.[2] And where a shareholder files a bill against his coshareholders

[1] 1 Keen, 24. In Macmahon v. Upton, 2 Sim. 473, it was decided that an act of Parliament giving to a company very extensive rights of suing and being sued, and by which it was provided "that in all proceedings, in which it would have been before necessary to state the names of the partners, it should be sufficient to state the name of the chairman only," did not extend to suits between the partners themselves, and, therefore, did not affect the general rule as to parties.

[2] See the observations of Lord Cottenham, 1 Myl. & C. 579; 4 id. 141, and Mr. Baron Alderson, 3 You. & Coll. 221, 224; and see Story's Eq. Pl., § 97.

for relief in respect of the joint contract between them, it is clear that he is not bound to make persons with whom he has no privity of contract parties to the bill, as for instance, persons who claim an interest in the concern by means of an irregular or fraudulent assignment. Nor as it seems, is he bound to make those persons parties who have assigned their shares, if he allege that they have duly accounted for the profits. These points seem to be decided by the case of Mare v. Malachy.[1] There a bill was filed by a person who claimed a certain definite interest in a mine and mining adventure, as one of a number of copartners, stating that the defendants, who were the legal owners of the mine, and also copartners in the adventure, had subsequently, unknown to the plaintiff, but with the consent of the other copartners, and after fully accounting to such copartners for the shares of the profits up to that time, sold and conveyed the mine to trustees for a joint-stock company, the property of which was held by a numerous body of proprietors in transferable shares, and had received the consideration partly in money and partly in shares in the joint-stock company, and praying that the defendants might, at the plaintiff's election, either account to the plaintiff for his proportion of the profits derived from the sale, or out of the shares of the joint-stock company in their hands, might transfer to him such a number of shares as would be equivalent to the interest which the plaintiff had in the original adventure. Lord Cottenham, C., held, upon demurrer for want of parties, that it was unnecessary to make the other copartners in the original adventure, or the trustees or shareholders in the joint-stock company, parties to the suit.

In cases where a bill is permitted to be filed by some of the shareholders on behalf of themselves and others, there should be an allegation in the bill that it is so filed,[2] and it is usual to allege that the bill is filed on behalf of all the shareholders *except* the defendants,[3] but the omission of the exception is immaterial, as the defendant in his character of shareholder has a joint interest with the plaintiff, and therefore, in that character, the bill may be filed in his behalf.[4] Where, however, a bill is filed by the trustees of a company, such trustees having, to a certain extent, distinct interests from the shareholders, it seems better, although the bill may be filed on behalf of the shareholders, to make the shareholders defendants; or, if they are very numerous, to make some of them defendants, and to allege that

[1] 1 Myl. & C. 559.
[2] Baldwin v. Lawrence, 2 S. & S. 18; Douglas v. Horsfall, id. 184.
[3] Chancey v. May, Prec. Ch. 592; Gray v. Chaplin, 2 S. & S. 267.
[4] Taylor v. Salmon, 4 Myl. & C. 142.

the plaintiffs do not know and are unable to ascertain the names of the other shareholders.[1]

Of the relative rights of shareholders and third persons.

SEC. 851. The law of England, unlike that of France, gives no power to unincorporated trading companies to limit the responsibility of any of their members. In France, a *commanditaire*, or partner *en commandite*, is not liable to creditors or other claimants upon the society beyond the amount of the capital which he has contributed, or engaged to contribute, to the joint stock.[2] In England, on the contrary, every member of an unincorporated trading company, no matter of what number of persons it consists, is answerable to the full extent of his private property for the whole of the debts of the company.[3] This doctrine was strongly inculcated by Lord Eldon in the case of Carlen v. Drury.[4] Some years afterward, when joint-stock companies became so prevalent, many cases materially affecting the interests of individuals were decided in conformity with the known rules of English law upon this subject.[5] Of these cases, several of which will be found in the Annual Register as well as in the Reports, it will be sufficient for our purpose to notice the following: An action of assumpsit was brought for goods sold and delivered. The plaintiff was a harness maker, and the defendant one of the members of a company called the "London Carrier Company," and the action was brought to recover a sum of 5*l.* 8*s.* 6*d.*, for articles delivered by the plaintiff at the premises of the company in Great Queen Street, Lincoln's Inn Fields. No evidence was adduced as to who gave the order for the goods. The company was insolvent, and the action was brought against the defendant alone. It was objected, on the part of the defendant, that the company was never regularly constituted. But,

[1] Fenn v. Craig, 2 You. & Coll. 216.

[2] On the other hand he is prohibited from acting for the partnership in its dealings with third persons. Its trade or business is exclusively conducted in the name or names, and by or under the control of one or more of the partners, who are liable without limitation. The name of a *commanditaire* is not permitted to appear in the name or firm of the society, and if he engage or intermeddle in any dealing with strangers, either in his character of partner or as agent of the partners who are liable without limitation, he instantly loses his immunity, and is thenceforth responsible to the same unlimited extent for the partnership debts and engagements. Parl. Hist. 1825, p. 710.

[3] Keasley v. Codd, 2 C. & P. 408, n.

[4] 1 Ves. & Bea. 157.

[5] In the Parliamentary History, to which we have more than once referred, there is an extremely able article, setting forth the advantages which would arise from the introduction of partnerships *en commandite* into this country. See Parl. Hist. 1825, p. 709, *et seq.* And see Mr. Bellenden Ker's Report on Partnership Law; Jurist, Vol. 1, p. 967. The statute 1 Vict., c. 73, which gives power to the Crown to limit the responsibilities of partners, will be found in the Appendix.

per Lord Tenterden: "That will make no difference. It is important that the public should know, that if persons connect themselves with a company of this description, they are every one of them liable to pay the demands upon it." Verdict for the plaintiff, damages, 5*l.* 8*s.* 6*d.*[1]

Liability of shareholder of unincorporated company.

SEC. 852. However, though a man is answerable to the full extent of his property, for the debts of an unincorporated company to which he either actually or ostensibly belongs, yet, as we have already seen, he is not to be charged as a partner, on the mere ground of his having done acts showing his assent to become a partner in case a projected company be carried into execution. And even after the formation of the company, there are some respects in which the shareholders stand in a different situation as to their liabilities from that of ordinary partners. Thus, there is no implied authority in a member of a joint-stock company to bind the company, or even the directors, by bills of exchange. A power to accept bills is sometimes given to the directors by the deed of settlement, but there is generally a provision in the deed, that, as far as is practicable, they shall pay the debts of the company in ready money.

As between the company and third persons, it seems clear that a bill negotiated in the name of the company by any one of the members, will, in the hands of a *bona fide* indorsee for value, be available against the whole body of the proprietors, provided there is nothing on the face of the bill to show that it was drawn or accepted in an unauthorized manner. But if the bill itself appears objectionable in this respect, an indorsee cannot recover upon it as against the company generally, but only against the actual drawer or acceptor. In Bramah v. Roberts,[2] C, who was a director in a joint-stock company, drew a bill upon the directors payable to his own order, which was addressed as follows:—"Messrs. A, B, C, and other directors of the South Metropolitan Gas-Light and Coke Company, No. 3, Crosby Square." The form of acceptance was:—"Accepted for self and directors, D, Chairman." C indorsed this bill to the plaintiffs, who brought their action upon it against all the directors. At the trial, no evidence was given by the plaintiffs of the constitution of the company, or of any authority given by deed, or otherwise, to any of the directors of the company to bind the company at large by the

[1] Keasley v. Codd, 2 Car. & Payne, 408.

[2] 3 Bing. N. C. 963.

acceptance of bills of exchange. It was held that the plaintiffs could not recover against the company generally, though the verdict which they had obtained against C and D was permitted to stand. Tindal, C. J., in delivering the judgment of the court, said that the right of one director to accept a bill for himself and the others, so as to make those others liable, was not a right or power implied by law, like that which belongs to one member of an ordinary partnership in trade, with respect to bills drawn and accepted for the purposes of the trade, but that it must depend upon the powers given by the charter, or deed or agreement under which the company is established and constituted, or some other agreement between the parties, whether a bill so drawn and accepted shall or shall not have that legal effect.

Again, although it has been decided upon the construction of certain acts of Parliament, that the members of joint-stock banking companies are amenable to the bankrupt laws,[1] yet it seems to have been doubted, and not to have been expressly settled, whether a member of an ordinary joint-stock trading company is in that character liable to be made a bankrupt. Upon general principles, however, it seems clear that he is liable.

If any shareholder in a company mortgages his shares and becomes bankrupt, then, unless notice of the assignment has been given to the company, the shares will be considered in the reputed ownership of the bankrupt, either if they be actually of a personal nature, or declared to be so by the act of Parliament or deed constituting the company. In the latter case, although they might not be personal for all purposes, yet they will be so as to all persons claiming through the bankrupt, and, consequently, as to the mortgagee.[2] Where, however, by a clause in the deed of settlement of a banking company, it was stipulated that the company should have a lien on the shares of such proprietors as were customers and indebted to the bank, and that no shares should be transferred without the consent of the directors, and an abstract of these provisions was indorsed on the certificate of the share held by each proprietor, it was held, upon the bankruptcy of a shareholder, that his shares (of which the certificates were in his possession) did not pass to his assignees by virtue of reputed ownership.[3]

---

[1] Ex parte Hall, 3 Deac. 405; 1 Mont. & Ch. 365.

[2] Ex parte Lancaster Canal Company, Mont. 116; Ex parte Vallance, 3 Mont. & A. 224; Ex parte Spencer, id. 692; Nelson v. London Assurance Company, 2 S. & S. 292.

[3] Ex parte Plant, 4 D. & C. 160.

A mortgagee of shares in a company must give notice of his incumbrance to the secretary, or his lien will be lost as against a subsequent purchaser for valuable consideration without notice.[1]

Powers of agent or manager of company.

SEC. 853. But the powers of a general agent for a mercantile company must be determined by the usage of trade, and the mode of transacting business in that department in which an agent is employed to act for his principal, will, in the absence of express directions, frequently determine a doubt as to the liability of the latter.[2] If, therefore, the course of the trade in which the company is engaged be such that bills of exchange are usual or necessary for the conduct of that trade, the law would imply an authority in such agent to bind the company by bills of exchange. But then the agent must be careful that he draws, accepts and indorses as agent; for, otherwise, he will be personally liable for such bills. In the case before Lord Holt,[3] a bill was drawn by one Mildmay, a servant of the York Buildings Company, payable to S or order, and the direction of it was to "John Bishop, cashier of the York Buildings Company, in Winchester street, London," and the conclusion of the bill was, "Place the same to the account of the York Buildings Company." At the same time, a letter was directed to the company, advertising them of this draft upon the defendant, Bishop. Bishop accepted the bill generally, in his own name, without taking any notice of the company. In an action by an indorsee against Bishop, the latter was held individually liable.

A similar point occurred in the case of Ducarry v. Gill.[4] An action of assumpsit was brought by the plaintiff, as indorsee, against the defendent, as drawer. The bill was addressed to Messrs. S. & Co., bankers, requiring them to pay to J. L., or order, 390*l.* sterling, for value received, and to place the same to the account of the trustees of the Chilian and Peruvian Mining Association. The bill was signed "Thomas Bagnold, Joseph Andrews," without further addition. It was countersigned by the secretary of the association. The defendant was one of the directors and shareholders of the company. Bagnold and Andrews were the agents. It appeared that they were not properly constituted the agents of the company; but Lord Tenterden said that, even supposing the agents had authority to bind the defend-

[1] Cumming v. Prescott, 2 You. & Coll. 488.
[2] Chitty on Contracts, 63.
[3] Thomas v. Bishop, 7 Mod. 180; 1 Str. 955.
[4] 1 Mood. & Malk. 450.

ant by their bills, they had not done so in this case, inasmuch as they had drawn the bill in their own name and not as agents.

Unincorporated companies, liability of.

SEC. 854. Joint-stock companies, unless privileged by an act of Parliament, are amenable to the ordinary law of partnership, which makes it necessary that all the members should be parties to actions or suits brought either by or against them; for no company, however large, can, without the aid of the legislature, depute a person to act on their behalf, as a party to an action or suit.[1] Joint-stock companies, therefore, stood under a peculiar disadvantage in this respect,[2] before it became the habit to obtain for them, by express enactment, the right of suing and being sued through the medium of one of their officers. The acts of Parliament which give them this privilege generally contain, in substance, the following provisions: 1st, that all actions and suits at law and in equity, and all petitions to found any commission in bankruptcy, to be commenced or instituted on behalf of the company or copartnership against the debtors of the partnership, whether members of the partnership or otherwise, shall be commenced or instituted in the name of the secretary for the time being, or in the name of the person acting or officiating as such, or in the name of any one member for the time being, for that purpose to be appointed as the nominal plaintiff, or petitioner on behalf of the company; 2d, that all actions, etc., to be commenced or instituted against the company or copartnership, by any person or persons, whether members of the partnership or otherwise, shall be commenced, etc., against the secretary for the time being of the company, or the person acting or officiating as secretary, or against any one member of the company as the nominal defendant on behalf of the company; 3d, that it shall be lawful and sufficient to state the name of the secretary for the time being, or of the person acting or officiating as such, or of any one member of the company so appointed as aforesaid, and that the death, resignation, removal, or any act of their secretary, or of any one member so appointed, shall

[1] Radenhurst v. Bates, 3 Bing. 471.

[2] One case, however, may be noticed, in which a joint-stock company has a greater facility of suing than an ordinary partnership has. Thus, if a bond be given to the trustees of an unincorporated company, conditioned for the faithful discharge of certain services to the company, the trustees may, at any time, sue on this bond, notwithstanding the fluctuating nature of the body to whom the bond is given. For it must be presumed that the contracting parties understood the word "company" to mean a fluctuating company, and not that they intended to enter into a nugatory contract. Metcalf v. Bruin. 12 East, 400. But this will not be the construction of a bond given to a firm in general.

not abate or prejudice any such action, suit, or other proceeding, commenced against, or by, or on behalf of the company.

It has been already remarked that, in the absence of express words giving a right of suit by and against shareholders, these enactments would not be deemed to extend to suits between the partners themselves. And it may also be noticed, that under these clauses the secretary or clerk by or against whom the actions are to be brought, cannot, if he has any claim for wages against the company, sue himself, but must, notwithstanding the provisions of the act, sue the company.[1]

The rule that proceedings at law cannot be restrained, except upon the default of the defendant in equity, should seem to be productive of considerable hardship to plaintiffs, who file bills to restrain actions brought against them by the public officer of a company; for companies are always on the watch for any bills that may be filed against them, and the public officer may readily put in such an answer as shall prevent the common injunction issuing against him. In Thorpe v. Hughes,[2] the plaintiff filed his bill, alleging that he had been fraudulently induced by the defendants, who were the public officer and directors of a banking company, to purchase shares, and that the defendants, the directors, had authorized the public officer to bring an action for the calls. The bill prayed discovery in aid of the defense to the action, and for an injunction in the meantime. The public officer answered, but the common injunction issued against the other defendants for want of an answer. The plaintiffs afterward moved that the injunction might be extended to stay the trial of the action on the ground, which was supported by affidavit, that the action was virtually that of the defendants who had made default. But Lord Cottenham, C., overruling a previous order of the Vice-Chancellor, refused the motion, on the ground that the injunction could only be sustained against defendants who had actually made default.

It seems probable that cases of this nature, as well as questions of equity pleading connected with joint-stock companies, will, amongst many other matters, be made the subject of the new rules to be issued in pursuance of the stat. 3 & 4 Vict., c. 95.

Of the management of companies.

SEC. 855. One of the great peculiarities of companies, as distinguished from partnerships, is that the management of a company's

[1] Per Best, C. J., 3 Bing. 471.

[2] 4 Myl. & C. 742.

business is intrusted to a few chosen individuals, and that the shareholders are deprived of that right of personal interference which is enjoyed by the members of ordinary firms.[1] The members of companies form two bodies, whose interests are or should be the same, but whose powers and functions are different, the one body consists of the directors, in whom the general powers of management are vested, and the other body consists of the great bulk of shareholders, to whom the directors are accountable, and by whom they are generally appointed. Each of these bodies has its own sphere of action, and its own rights and duties, as will be seen more particularly hereafter.

In companies which are not governed either by the Joint-Stock Companies Registration Act, or by the Companies Clauses Consolidation Act, or by the Joint-Stock Companies Act, 1856, the special act, charter, or deed of settlement of every company determines how its managing body is to be constituted, and what the powers of that body are. If there is no provision in the special act, charter, or deed of settlement bearing upon the subject, then the majority of the shareholders of the company must determine how its affairs are to be conducted, and to whom, and under what restrictions, the management of those affairs shall be intrusted.[2] This is the rule which prevails in cost-book mining companies,[3] and it is not easy to conceive what, except the will of the majority, can determine a matter of this description under the circumstances now supposed.

The number of persons composing the managing body of a company is generally fixed by the company's special act, charter, deed of settlement, or regulations, and the number making a *quorum* is also usually thereby fixed. As a general rule, there is no doubt that a power intrusted to a given number of individuals cannot be properly exercised by any less number, and there are several cases in which this principle has been applied to companies, and in which the acts of directors have been held invalid on the ground that they were not done by the requisite number of directors.[4] But it does not, therefore, follow that the number of directors, as originally fixed, cannot be altered by the majority of a meeting of the shareholders, and where the number is not fixed by the legislature or the Crown, it seems that

[1] See Burnes v. Pennell, 2 Ho. Lo. Ca. 520 and 521. This section, as well as the six following, are from Lindley on Partnership.

[2] The powers of majorities will be examined hereafter.

[3] See Tapping on the Cost Book, p. 64.

[4] See Kirk v. Bell, 16 Q. B. 290; Bosanquet v. Shortridge, 4 Ex. 699; Brown v. Andrews, 18 Jur. 938, Q. B.; Kingsridge Flour Mill Co. v. Plymouth Grinding Co., 2 Ex. 718; Ridley v. Plymouth Grinding Co., id. 711. See, too, Ex parte Morrison, De G. 589.

the shareholders may alter it.[1] Even where the number is fixed by an act of Parliament or a charter, the act or charter may be so worded as to be in this respect directory only, and in a case where a call had been made by five out of seven directors, when it ought to have been made by five out of twelve, the Court of Common Pleas refused to set aside a judgment obtained by the company against a shareholder for the call, although he deposed that when the judgment was obtained he did not know that there were, in fact, only seven directors instead of twelve, as required by the company's act.[2]

It is to be observed that the directors of a company are not those only who choose to act, but all those persons who are constituted directors by a company's act, charter, or deed of settlement, and that whether a person once a director has or has not ceased so to be depends (except in the case of his death) upon the rules of the company.[3] A director who becomes bankrupt, or ceases to attend to his duties, does not thereby necessarily vacate his office.[4]

Generally speaking, the members of the managing body are required to possess certain qualifications, and to be appointed in some prescribed manner. But it by no means follows that persons who are in fact acting as duly qualified directors will be prevented from so doing by a court of equity, simply because they have been irregularly appointed,[5] or that the irregularity of their appointment will render all their acts null and void. Persons dealing with them as directors *bona fide*, and without notice of the irregularity, would, it is conceived, be entitled to treat them as the agents of the company, and to hold the company bound by their acts, as if they were its duly appointed directors. But, as between themselves and the shareholders, the irregularity is of greater importance, and it would be going far to hold that persons *de facto*, but not *de jure* directors, could make valid calls and forfeit shares for their non-payment,[6] unless there were some provision rendering valid the acts of those *de facto* in power.

Where a person is required to hold a certain number of shares

[1] Smith v. Goldsworthy; 4 Q. B. 430.

[2] Thames Haven Dock, etc., Co. v. Rose, 4 Man. & Gr. 552. See, too, Bargate v. Shortridge, 5 Ho. Lo. Ca. 297.

[3] Phelps v. Lyle, 10 A. & E. 113.

[4] Id.; see Wilson v. Wilson, 6 Scott, 540.

[5] See Foss v. Harbottle, 2 Ha. 461, and Mozley v. Alston, 1 Ph. 793. These cases will be noticed hereafter.

[6] See Miles v. Bough, 3 Q. B. 845; Edinburgh, etc., Rail. Co. v. Hebblewhite, 6 M. & W. 707; South Eastern Rail. Co. v. Hebblewhite, 12 A. & E. 497; Swansea Dock Co. v. Levien, 20 L. J. Ex. 447; Howbeach Coal Co. v. Teague, 8 W. R. 264.

as a qualification for the office of director, he is not disqualified for the office, simply because he may have mortgaged his shares.[1]

Where the shareholders have power to remove a director for "any reasonable cause," the shareholders are themselves the judges as to what is and what is not a reasonable cause for removal, and their decision will not be interfered with, unless a clear case of fraud on their part can be established.[2]

The shareholders cannot usually exercise any control over the management of the company, except at meetings duly convened. Provision is consequently generally made for the holding of meetings, and it is not a little important that the right to convene them should, to some extent at all events, be exercisable by the shareholders themselves. It is, however, to be observed that, where those who have the right to call a meeting of the shareholders, refuse to exercise that right, for the express purpose of preventing the shareholders from duly assembling, a court of equity will, if necessary, interfere to protect the shareholders against an abuse of power on the part of those intrusted with the management of the affairs of the company.[3]

In order that a resolution come to at any meeting, whether of directors or of shareholders, may have any legal effect, it is necessary that the meeting should be duly convened, that the resolution should relate to a matter which the meeting is competent to pass a resolution upon, and that the resolution should be duly passed.[4] As a general rule, a meeting is not duly convened unless every person entitled to attend has notice of the time and place at which it is to be held, so that he may have it in his power to attend or not.[5] A person who does attend a meeting cannot dispute the validity of what is done on the ground that he had not due notice that the meeting was about to be held; and if all entitled to notice have it in fact, but not in the precise form in which it ought to have been given them, the proceedings of the meeting will not necessarily be invalid.[6] But still it is absolutely requisite for the protection of those who are to be affected by the resolutions of others that such resolutions shall have no effect

[1] Cumming v. Prescott, 2 Y. & C. Ex. 488.

[2] Inderwick v. Snell, 2 Mc. & G. 216. See, as to becoming bankrupt, Phelps v. Lyle, 10 A. & E. 113; absconding from creditors, Wilson v. Wilson, 6 Scott, 540.

[3] See Foss v. Harbottle, 2 Ha. 461. The occasions on which a court of equity will interfere to control the management of the affairs of a company will be examined hereafter.

[4] It does not follow that because a majority of shareholders can bind the minority, the majority present at any particular meeting can bind the company. See Howbeach Coal Co. v. Teague, 8 W. R. 264.

[5] R. v. Langhorn, 4 A. & E. 538.

[6] See British Sugar Refining Co., 3 K. & J. 408.

unless all entitled to a voice in making them had an opportunity of expressing their views. In a case where directors were empowered to meet once a week at their office, without notice or summons, but on and at such day and hour as they should from time to time agree upon, it was held that a resolution come to by a quorum assembled without notice was invalid, inasmuch as no day or hour for the meeting of the directors had ever been fixed.[1]

The mode in which notice is to be given varies with almost every company. Such general enactments as exist upon the subject will be noticed hereafter. The only general rule which can be laid down is that notice must be given in the manner prescribed by each company's act, charter, deed of settlement, or regulations. It seems that it is not necessary to give notice of the holding of an adjourned meeting to the persons entitled to attend it; it is apparently sufficient if they had notice of the holding of the original meeting.[2] But nothing can, without notice, be transacted at an adjourned meeting except the unfinished business of the first meeting.[3]

There are two kinds of meetings, viz.: ordinary and extraordinary.[4] Ordinary meetings are usually held at stated times and for the transaction of business generally. Extraordinary meetings are held as occasion may require, for the transaction of some particular business, which ought to be specified in the notice convening the meeting. A resolution passed at an extraordinary meeting, upon a matter for the consideration of which it was not avowedly called, or which was not specified in the notice convening the meeting, is altogether inoperative; and although such resolution may have been confirmed at a subsequent ordinary meeting, it will still be invalid, unless it might have been properly passed in the first instance at an ordinary meeting, without previous notice of any intention to enter upon the matter to which the resolution relates.[5]

One and the same meeting may be both ordinary and extraordinary; ordinary for the purpose of transacting the usual business of the company, and extraordinary for the transaction of some particular business, of which special notice may have been given.[6] If an ordinary meeting is held and adjourned, the adjourned meeting continues to be an ordinary meeting, although special notice is given that it is about to be held for special business.[7]

[1] Moore v. Hammond, 6 B. & C. 456.
[2] See Wills v. Murray, 4 Ex. 843, 862.
[3] R. v. Grimshaw, 10 Q. B. 747.
[4] Sometimes called general and special.
[5] Lawes' case, 1 De G. Mc. & G. 421.
[6] See Cutbill v. Kingdom, 1 Ex. 494; Graham v. Van Diemen's Land Co., 1 H. & N. 541.
[7] Wills v. Murray, 4 Ex. 843.

The power of making by-laws for the regulation of the affairs of a company is not unfrequently reposed in its shareholders; and it is not uncommonly required that all by-laws shall be sealed with the seal of the company. In such a case nothing which is not so sealed can be regarded as a by-law;[1] nor is an unsealed resolution passed at a meeting of the shareholders of an incorporated company equivalent to a contract under the seal of such company.[2] At the same time it is clear that, as a general rule, the resolutions of meetings of members of a body corporate do not require to be sealed in order to be binding on its members, as between themselves, and as members. Acts relating to the internal affairs of a corporation, affecting members only, and affecting them merely as members, do not in general require the common seal to render them valid.[3]

By-laws not warranted by the authority which empowers them to be made are altogether illegal.[4]

Where there is no special provision to the contrary, the resolution come to by the majority of those present at a meeting is the resolution of that meeting. Absentees are not entitled to vote by proxy unless they are specially empowered so to do.[5] Where voting by proxy is allowed, the appointment of the proxy must be stamped,[6] and the appointment should specify the particular meeting at which the proxy is empowered to vote, for otherwise the proxy paper will require a thirty-shilling instead of a half-crown stamp.[7]

Absentees cannot effectually urge their ignorance of what took place at meetings which they might have attended had they thought proper so to do, and they are bound by the resolutions come to at a duly convened meeting, provided such resolutions relate to matters upon which the meeting was competent to decide.[8]

The limits of the power of a majority will be examined hereafter.

Minutes of meetings, and the contents of books kept by the officers of a company, are not, as against third persons, evidence for the company, unless expressly made so by act of Parliament.[9] Partnership books are, as a rule, evidence against every partner, because every

[1] Dunston v. Imperial Gas Co., 3 B. & Ad. 125.
[2] Id.
[3] Grant on Corp. 65.
[4] See Calder, etc., Nav. Co. v. Pilling, 14 M. & W. 76; Adley v. Whitstaple Co., 17 Ves. 315; 19 id. 304, and 1 Mer. 107.
[5] See Grant on Corp. 256, note q; Com. Dig. Franchise, F. 11.
[6] R. v. Kelk, 12 A. & E. 559. Formerly this was doubted, Monmouthshire Canal Co. v. Kendall, 4 B. & Ald. 453.
[7] See Trinity House of Hull v. Beadle, 13 Q. B. 175.
[8] See Norwich Yarn Co., 22 Beav 165.
[9] Hill v. Manchester Water Works Co., 5 B. & Ad. 866. Compare Alderson v. Clay, 1 Stark. 405, and The Thetford case, 12 Vin. Ab. 90, pl. 16; Maguire's case, 3 De G. & S. 31.

partner is entitled not only to see them, but, in conjunction with his copartners, to determine what shall be inserted and what not; but this is not the case with shareholders of companies, and consequently the books of a company are no more evidence against ordinary members of the company, than they are as against strangers. The inconvenience resulting from this principle is obviated in modern acts of Parliament by making certain things, *e. g.*, the registers of shareholders, and signed minutes of meetings, *prima facie* evidence as well against shareholders as against strangers.

With respect to minutes of meetings, it is usual for acts of Parliament to require that the minutes of every meeting shall be entered in a book, and be signed by the chairman of the meeting, and to declare that the minutes so entered and signed shall be admissible in evidence in courts of justice. In practice, the minutes of a meeting are commonly made up and entered by the secretary after the meeting is over, and the chairman signs such minutes at a subsequent period (generally the next meeting). It has been frequently urged that a resolution made at a meeting, the minutes of which were entered and signed after the meeting was over, could not, by such minutes, be proved to have been made. But this objection has always been overruled, even where the minutes of each meeting ought in strictness to have been signed at that meeting.[1]

Companies governed by 7 & 8 Vict., c. 110—as to the managing body.

SEC. 856. The deed of settlement of every company registered under this act is required[2] to contain provisions:

For prescribing the maximum number of directors to be appointed, the number of shares or the amount of interest by which they are to be qualified, the period for which they are to hold office, so that at least one-third of such directors, or the nearest number to one-third, shall retire annually, subject to re-election if thought fit, and for the determination of the persons who shall so retire in each year;

For filling up vacancies in the office of the directors as they occur, but not so as to enable the board of directors (if the filling up be assigned to them) to fill up such vacancy for a longer period than until the next general meeting of the company;

---

[1] Miles v Bough, 3 Q. B. 845; Southampton Dock Co. v. Richards, 1 Man. & Gr. 448; West London Rail. Co. v. Bernard, 3 Q. B. 873; London and Brighton Rail Co. v. Fairclough, 2 Man. & Gr. 675; Inglis v. Great Northern Rail. Co., 1 M'Queen, 112.

[2] 7 & 8 Vict., c. 110, § 7, sched. A, 12 to 30.

For the continuance in office of directors in default of election of new directors;

For regulating the meetings of directors, the quorum thereof, the proceedings thereat, and the adjournment thereof;

For recording the attendance of directors, and reporting the same to the shareholders;

For the determination of questions upon which the votes of the directors may be equally divided;

For the appointment of a person to take the chair of the directors, and for supplying any vacancy in the office of chairman;

For the appointment of the chairman of the directors, at meetings at which the permanent chairman may not be present;

For regulating the appointment by the directors of officers, clerks, and servants;

For recording the proceedings of the directors;

For keeping and entering of minutes of such proceedings;

For insuring the safe custody of the seal of the company, and for regulating the authority under which it is to be used;

For providing for the remuneration of the auditors of the accounts of the company;

For providing for the appointment of a secretary or clerk (if any) of the directors;

For providing for the receipt, custody, and issue of moneys belonging to the company;

For providing for the keeping of books of account, and for periodically balancing the same;

For keeping the records and papers of the company;

For prescribing and regulating the duties and qualifications of officers;

For determining what books of account, books of registry, and other documents may be inspected by the shareholders of the company, and for regulating such inspection.[1]

The act requires that there shall be three directors at least, and that five years shall be the extreme limit of their appointment.[2] The act also makes it indispensable that every director shall hold in his own right one share at least in the company,[3] and shall cease to be a director by becoming bankrupt or insolvent, suspending payment,

[1] See 7 & 8 Vict., c. 110, ss. 33, 37, 50, and 57 as to inspection.

[2] Id., s. 25, No. 13; compare this with sched. A. No. 12.

[3] Id., s. 28; as to the effect of mortgaging shares, see Cumming v. Prescott, 2 Y. & C. Ex. 488.

compounding with his creditors, being declared lunatic, or by ceasing to hold the number of shares which a director may be required to hold by the company's deed of settlement.[1] But provision is made for rendering valid the acts of directors notwithstanding some defect in their appointment, or some ground of disqualification may afterward be discovered.[2] It is expressly declared that a director shall not vote or act as a director on the subject of any contract proposed to be made by or on behalf of the company, and in which he is personally interested; and that if any contract (other than such as the act specifies) is entered into in which a director is interested, the terms of it shall be submitted to the shareholders, and it shall not have any force until approved by them.[3]

This last enactment is very important. Its effect is two-fold. (1) It It renders the interested director incompetent to vote upon or to act as a director with reference to the matter in which he is interested; and (2) it renders the contract void unless confirmed by the shareholders at such a meeting and in such a manner as are prescribed by the act.[4] The meeting must be either the next general meeting, or a meeting specially summoned for the purpose of taking the contract into consideration.[5] It has been held that a loan by a director to the company is within the enactment, and that if the loan has been kept from the knowledge of the shareholders, the company is not bound to repay the money advanced.[6] Unfortunately, however, the propriety of this decision has been questioned.[7]

The act[8] expressly declares that the shareholders are not to act in their own behalf in the ordinary management of the concerns of the company otherwise than by means of directors, and provides that, subject to any special provisions in the company's deed, the directors are to have power —

To conduct and manage the affairs of the company according to the provisions and subject to the restrictions of the act, and of the deed

[1] Id., s. 29.
[2] Id., s. 31.
[3] Id., s. 29.
[4] Ernest v. Nicholls, 6 Ho. Lo. Ca. 401; Curteis v. Anchor Ins. Co., 2 H. & N. 537; Poole v. National, etc., Ass. Soc., id. 687; Stear's case, 7 W. R. 665; now reported, 1 Johns. 480. See, as to the purchase of shares by directors, Hodgkinson v. Nat. Live Stock Ins. Co., 5 Jur. (N. S.) 478, and 969, and in 26 Beav. 473.
[5] Murray's Executors' case, 5 De G. M. & G. 746.
[6] Teversham v. Cameron's, etc., Rail. Co., 3 De G. & S. 296.
[7] See Murray's Executors' case, 5 De G. M. & G. 746. See, too, Sheffield and Manchester Rail. Co. v. Woodcock, 7 M. & W. 674. In Bluck v. Malalieu, 5 Jur. (N. S.) 1018, the directors were empowered to lend money to the company, but they were held to have no right to borrow money from it.
[8] 7 & 8 Vict., c. 110, s. 27.

of settlement, and of any by-law, and for that purpose to enter into all such contracts, and do and execute all such acts and deeds as the circumstances may require;

To appoint the secretary, if any;

To appoint the clerks and servants, and also from time to time, as they see fit;

To remove such secretary, clerks, and servants, and to appoint others, as occasion shall require;

To appoint other persons for special services, as the concerns of the company may from time to time require;

To hold meetings periodically and from time to time, as the concerns of the company shall require;[1]

To appoint a chairman to preside at all such meetings, and in his absence to appoint a chairman at each such meeting.

But it is unlawful for the directors, without the sanction of the shareholders, to purchase any shares of the company,[2] or to sell any shares except those forfeited for non-payment of calls, or to lend to each other or to any officer of the company any of the money of the company.[3]

The company's deed is required to contain provisions as to the company's capital and the borrowing of money, and for determining whether the directors may contract debts in conducting the affairs of the company, and if so, whether to any definite extent, and whether, and to what extent, the directors may make or issue promissory notes or accept bills of exchange.[4] The act requires that, with some few exceptions, all contracts entered into on behalf of the company shall be in writing and signed by two at least of the directors, and be sealed with the seal of the company; and that all such contracts shall be reported to the secretary and be entered by him in proper books to be kept for that purpose.[5] All bills of exchange and promissory notes accepted or made on behalf of a company are required to be signed by two directors, and to be countersigned by the secretary; indorsements may be made by any officer appointed for the purpose; and every bill or note accepted, made, or indorsed on behalf of the company, is required to be reported to the proper officer of the company, who is to enter the same in proper books to be kept for the purpose.[6]

[1] The meetings here referred to are meetings of directors.

[2] See as to the purchases of shares, Hodgkinson v. Nat. Live Stock Ins. Co., 5 Jur. (N. S.) 478, and 969.

[3] 7 & 8 Vict., c. 110, s. 27.

[4] Id., s. 7, and sched. A. 33 and 38. The capital of the company will be adverted to hereafter.

[5] Id., s. 44.

[6] Id., s. 45.

All instruments bearing the seal of the company are required to be signed by at least two of its directors.[1]

As was seen in an earlier part of the work, it is the duty of the directors to keep the "register of shareholders,"[2] and to allow any shareholder to see it and to have a copy of it or any part of it on payment of a small fee,[3] and to give every shareholder entitled to it and requiring it, a certificate of his proprietorship of any share held by him.[4] It is also the duty of the directors to keep at every principal place of business of the company an index or abstract of the company's deed of settlement approved by the registrar of joint-stock companies, and a list of the shareholders of the company, and the number of shares held by each, and a list of the directors and officers of the company, and a copy of its by-laws; and any shareholder or person authorized by him in writing is entitled at any reasonable time during the usual hours of business to inspect these documents.[5] The shareholders are also entitled to inspect the books in which the proceedings of the company are recorded.[6]

The duties of the directors as regards the accounts of the company and the transfer of shares, and their power to increase the company's capital to borrow money, make calls, and forfeit shares, will be alluded to hereafter.

As to the shareholders.

SEC. 857. It has been already seen that the shareholders must intrust the management of the affairs of the company to directors.[7] The company's deed is required to contain, amongst other things,[8] provisions:

For holding ordinary general meetings of the company once at least in every year at some appointed place and time;

For holding extraordinary meetings, either upon the convening of the directors of the company or upon the requisition of not less than five shareholders;

For the adjournment of meetings;

For the advertisement and notification of meetings and the business to be transacted thereat;

---

[1] Id., s. 46.
[2] 7 & 8 Vict., c. 110, s. 49.
[3] Id., s. 150.
[4] Id., ss. 51, 53.
[5] Id., s. 57.
[6] Id., s. 33. The proceedings of the company are not the same as the proceedings of the directors, and a shareholder is not under this section entitled as a matter of course to inspect the minutes of the meetings of the directors. R. v. Maraquita Mining Co., 5 Jur. (N. S.) 725, Q. B.
[7] 7 & 8 Vict., c. 110, s. 27.
[8] Id., s. 7, and sched. A. 1 to 11.

For defining the business which may be transacted at meetings ordinary and extraordinary, or at adjournments thereof.

For the appointment of the chairman at any meeting of the company.

For insuring that each shareholder shall have a vote, and, where it is not provided that each shareholder is to have a vote in respect of each share, the appointment of the number of votes to be given by shareholders in respect of any number of shares held by them;

For enabling guardians, trustees and committees to vote in respect of the interests of infants, *cestuis que trust*, lunatics, and idiots;

For ascertaining what shall be the majorities or numbers of votes requisite to carry all or any questions, and where a simple majority is to decide;

For prescribing the mode and form of the appointment of proxies to vote in the place of absent shareholders, and for limiting the number of proxies which may be held by any one person;

For determining questions where the votes are equally divided, whether by the casting vote of the chairman or otherwise.

No shareholder who has not signed the company's deed or a deed referring to it, and paid all his calls, and been registered as a shareholder, is entitled to receive any dividends or profits or to exercise any of the rights conferred by the act upon shareholders; but every registered shareholder who has executed the deed and paid his calls is entitled to be present and take part in the discussions at all general meetings of the company, and to vote in the determination of any question thereat, either in person or by proxy (unless the company's deed precludes shareholders from voting by proxy), and to vote in the choice of directors and of every auditor to be appointed by the shareholders.[1] Where, however, a share is registered in the names of more than one person, the one whose name is first on the register is regarded as the holder of such share for the purpose of voting and exercising the privileges conferred on shareholders, and it is to him that all notices required to be given to shareholders are to be given.[2]

The power of making by-laws for the regulation of the shareholders, members, directors, and officers of the company is vested in the shareholders, but no by-law is valid if repugnant to the act or the com-

[1] 7 & 8 Vict., c. 110, s. 26. The shareholders in companies governed by this act are empowered to vote by proxy unless the company's deed declares that they shall not.

[2] 7 & 8 Vict., c. 110, s. 56.

pany's deed of settlement.[1] Every by-law must be in writing, sealed with the seal of the company, and be registered at the office for registering joint-stock companies, and until registered no by-law is of any force.[1]

The appointment of the directors[2] and of at least one of the auditors,[3] lies with the shareholders, but the directors may be empowered temporarily to fill up vacancies occurring in their office.[4]

Subject to the provisions of the company's deed and to any by-law, every shareholder has a right to inspect as mentioned in the act:

1. The books in which the proceedings of the company are recorded;[5]
2. The books of account of the company;[6]
3. The register of shareholders;[7]
4. A copy of the index or abstract of the company's deed approved by the registrar of joint-stock companies;[8]
5. A list of the shareholders of the company, and the number of shares held by each;[8]
6. A list of the directors and officers of the company;[8]
7. A copy of its by-laws;[9]

The shareholders are also entitled to, or can on payment procure, copies of—

1. The company's deed and every thing else registered by or returned to the registrar of joint-stock companies.[10]
2. The company's accounts;[11]
3. The balance sheets and reports prepared by the company's auditors;[12]
4. The company's by-laws;[13]
5. The register of shareholders;[14]

Companies governed by 8 and 9 Vict., c. 16, as to the managing body.

SEC. 858. The Companies Clauses Consolidation Act contains several important provisions relating to the appointment, rotation, powers, and proceedings of directors of the companies to which the act applies.[15] The special act of such a company is supposed to fix the number of its directors, and this number cannot be varied except within such limits as may be thereby allowed,[16] a certain number of

[1] 7 and 8 Vict., c. 110, s. 25, No. 11.
[2] Id., s. 47.
[3] Id., ss. 25, 26.
[4] Id., s. 38.
[5] Id. sched. A. No. 18.
[6] 7 and 8 Vict., c. 110, s. 38; see R. v. Maraquita Mining Co., 5 Jur. (N. S.) 725, Q. B., and *ante*.
[7] Id., s. 37.
[8] Id., s. 50.
[9] Id., s. 57.
[10] Id., s. 18.
[11] Id., s. 37.
[12] Id., ss. 42, 43.
[13] Id., s. 47.
[14] Id., s. 50.
[15] See 8 and 9 Vict. c, 16, ss. 81 to 109.
[16] Id., ss. 81, 82.

the directors are required to retire from office in rotation every year, so that all the directors may be changed every three years; the persons to retire are to be determined by the directors by ballot if they do not otherwise agree, but the persons to take their place are to be elected by the shareholders.[1] Occasional vacancies are to be supplied by the directors themselves.[2] In order that a person may be eligible as a director he must be a shareholder, and hold as many shares as may be required by the company's special act.[3] Moreover, it is expressly declared that no person holding an office or place of trust or profit under the company, or interested in any contract with the company, is capable of being a director;[4] and that if any director accepts or holds any other office or place of trust or profit under the company, or is directly or indirectly concerned in any contract with the company, or participates in the profits of any work to be done for it, or ceases to be the holder of the prescribed number of shares, then his office shall become vacant, and he shall cease from voting or acting as a director.[5] But an exception is made as regards a director whose only interest in a contract with the company arises from his having shares in another company with which such contract is made.[6] It will be observed that these provisions do not, like those in 7 and 8 Vict., c. 110, render void a contract made between a director and the company, unless such contract is confirmed by the shareholders; and it was held by the Court of Common Pleas, in Foster v. The Oxford Rail. Co.,[7] that such a contract was not void. But it must not be forgotten that, although the act does not expressly invalidate contracts of this description, there is in equity a well-established principle which precludes any person whose duty it is to take care of others from binding them by any bargain entered into on their behalf with himself, unless all the circumstances relating to such bargain are fully and clearly explained to them. And upon this ground it was held by the House of Lords in The Aberdeen Rail. Co. v. Blaikie,[8] that a contract made between a Scotch railway company and a firm of iron-founders, of which one of the company's directors was the managing partner, could not be enforced against the company. It is much to be regretted that the principles on which this case was decided should not be recognized and enforced by courts of law, as they invariably are by courts of equity.

[1] 8 and 9 Vict., c. 16, ss. 83, 84, 88.
[2] Id., s. 89.
[3] Id., s. 84.
[4] Id., s. 85.
[5] Id., s. 86.
[6] Id., s. 87.
[7] 18 C. B. 200.
[8] 1 Macqueen, 461.

With respect to the nature of the contracts which disqualify a person interested in them from being a director, it has been held that they must be contracts made with the company in the prosecution of its undertaking, and that there is nothing to prevent a banker of a company from being one of its directors.[1]

To return to the act. The directors have the management of the affairs of the company, with the exception of such as are required to be transacted by a general meeting.[2] They are subject to the control of a general meeting specially convened for the purpose, but no resolution of any such meeting renders invalid what may have been done before the resolution passed.[3] The directors are required to hold meetings at such times as they shall appoint, and they are empowered to adjourn such meetings as they may think proper.[4] Any two directors may require a meeting of directors to be called.[4] One-third of the whole number of directors constitutes a quorum, unless some other quorum is prescribed by the company's special act.[4] All questions at any meeting are determined by a majority of votes of the directors present, and, in case of an equality of votes, the chairman has a casting vote.[4] A chairman is required to be elected, and the elected chairman continues in office for a year.[5] A deputy chairman may be elected, if the directors think fit, and vacancies in the office of chairman and deputy chairman are to be filled up.[6] In case of the absence at any meeting of the chairman and deputy chairman, the directors present are to choose one of their number to be a chairman for that meeting.[7]

The directors are authorized to delegate their powers to one or more committees.[8]

The mode in which contracts are to be made on behalf of the company has been already explained.[9]

The directors are required to cause to be entered in proper books notes or minutes of all appointments and contracts made by them, and of the orders and proceedings of all meetings of the company, and of the directors and their committees.[10] All entries are to be signed by the chairman of the meeting at which they are made, and entries so signed are receivable in evidence without any preliminary proof.[11]

---

[1] Sheffield & Manchester Rail. Co. v. Woodcock, 7 M. & W. 574.
[2] 8 & 9 Vict., c. 16, s. 90; see, as to this, s. 91.
[3] 8 & 9 Vict., c. 16, s. 90.
[4] Id., s. 92.
[5] Id., s. 93.
[6] Id.
[7] Id., s. 94.
[8] Id., ss. 95, 96.
[9] Id., s. 97.
[10] Id., s. 98.
[11] Id. See as to this, Miles v. Bough, 3 Q. B. 845.

The proceedings of *de facto* directors are not invalid, although it may afterward be discovered that there was some defect in their appointment, or that they were disqualified.[1]

The directors are not personally liable for what they may lawfully do on behalf of the company, and they are entitled to be indemnified by the company against all costs, charges and expenses properly incurred by them in the exercise of the powers intrusted to them.[2]

The directors are required to take security from every person intrusted with the custody or control of the moneys of the company,[3] and they are empowered to demand from every officer employed by the company an account of all moneys received by him on behalf of the company, and the delivery up of all receipts and vouchers, and payment of the balance which may appear to be owing from him on such account.[4] A summary remedy is provided in case such a demand is not complied with,[5] and also against any officer believed to be about to abscond without accounting.

As to the shareholders of statutory company.

SEC. 859. Ordinary general meetings of the shareholders are to be held twice a year, viz., in February and August, unless the company's act otherwise directs.[7] Extraordinary general meetings may at any time be convened by the directors;[8] but provision is also made for convening such meetings at the instance of the shareholders.[9] In order to constitute a meeting, there must be present, either personally or by proxy, the quorum prescribed by the special act; and where no quorum is prescribed, then shareholders, holding in the aggregate not less than one-twentieth of the capital of the company, and being in number not less than one for every 500*l.* of such required proportion of capital, unless such number would be more thau twenty, in which case twenty shareholders, holding not less than one-twentieth of the capital of the company, shall be the quorum.[10] Every meeting is to be presided over by a chairman, viz., by the chairman of directors, or in his absence, by the deputy chairman, or in the absence of both, by a director chosen by the meeting, or in the absence of all the directors, by a shareholder similarly chosen.[11]

---

[1] Id., s. 99.
[2] 8 & 9 Vict., c. 16, s. 100.
[3] Id., s. 109; see Evans v. Coventry, 2 Jur. (N. S.) 557, V. C Kindersley.
[4] 8 & 9 Vict., c. 16, s. 110.
[5] Id., ss. 111, 112.
[6] Id., s. 113.
[7] Id., s. 66.
[8] Id., s. 68.
[9] Id., s. 70.
[10] Id., s. 72. For some purposes a less quorum is sufficient, see section 72.
[11] Id., s. 73.

Fourteen days' public notice, at least, of all meetings are to be given by advertisement;[1] and every notice of an extraordinary meeting is to specify the purpose for which the meeting is called;[2] and if any matters, except such as are authorized by the legislature to be done at an ordinary meeting, are to be transacted at such a meeting, the notice convening that meeting must state what those matters are.[3] The shareholders present at any meeting are to proceed with the business to transact which the meeting shall have been convened, and with no other business; and no business is to be transacted at an adjourned meeting, except that left unfinished at the first meeting.[4]

No shareholder is entitled to vote, unless all the calls upon his shares have been paid;[5] but with this qualification, and except where the company's special act otherwise provides, every shareholder is entitled to one vote for every share he holds up to ten, and to one additional vote for every additional five shares up to one hundred, and to an additional vote for every ten shares beyond the first hundred.[6] Voting by proxy is allowed, subject to certain regulations, easily complied with,[7] and every proposition is determined by a majority of votes, the chairman having the casting vote in case of an equality.[8] Where a share is registered in the names of more persons than one, he whose name stands first on the register is to be treated as the shareholder for all purposes of voting. Lunatic shareholders are entitled to vote by their committees, and infant shareholders by their guardians.[10] In case of a dispute as to whether any resolution has been passed by the required majority, a poll may be demanded; but, if no poll is demanded, the decision of the chairman is final.[11]

The shareholders elect the directors,[12] but occasional vacancies occurring among them may be filled up by the continuing directors.[13] The shareholders also appoint the auditors, and determine the remuneration of the directors, auditors, treasurer and secretary, the amount of money to be borrowed on mortgage, and the extent to which the company's capital may be augmented.[14] Dividends, moreover, can only be declared at a general meeting of the shareholders.[15]

[1] Id., s. 71, and see s. 138.
[2] Id.
[3] Id., and s. 67.
[4] Id., s. 74, and see ss. 67, 69.
[5] Id., s. 75.
[6] Id.
[7] Id., s. 76, 77.
[8] 8 & 9 Vict., c. 16, s. 76.
[9] Id., s. 78.
[10] Id., s. 79.
[11] Id., s. 80.
[12] Id., ss. 83, 91.
[13] Id., s. 89.
[14] Id., s. 91. See, too, as to auditors, ss. 101 and 104, and, as to borrowing money, s. 38, etc. A company must pay its secretary for his services, although his remuneration may not have been fixed at a general meeting. Bill v. Darenth, etc., Rail. Co., 1 H. & N. 805.
[15] 8 & 9 Vict., c. 16, s. 91.

The shareholders can, also, at a meeting specially convened for the purpose, make regulations for the conduct of the directors.[1] The power of making by-laws may be exercised by the directors, subject to the control of the shareholders.[2]

The company's register of shareholders is to be authenticated by the seal of the company at the ordinary general meetings of shareholders.[3]

Shares cannot be forfeited for non-payment of calls without the sanction of a general meeting of shareholders.[4]

The shareholders have a right to inspect:

1. The shareholders' address book;[5]
2. The register of mortgages and bonds;[6]
3. The register of consolidated stock;[7]
4. The company's books of account;[8]
5. The company's special act.[9]

They have also a right to have copies of, or any part of the shareholders' address book, and the company's books of account, and special act.[10]

Copies of the company's special act may always be seen by any person interested.[11]

Of the sale and transfer of shares.

SEC. 860. When persons enter into a contract of partnership, their intention ordinarily is that a partnership shall subsist between themselves and themselves alone. The mutual confidence reposed by each in the other is one of the main elements in the contract, and it is obvious that persons may be willing enough to trust each other, and yet be unwilling to place the same trust in any one else. Hence it is one of the fundamental principles of partnership law that no person can be introduced as a partner without the consent of all those who for the time being are members of the firm. If, therefore, a partner dies, his executors or devisees have no right to insist on being admitted into partnership with the surviving partners, unless some agreement to that effect has been entered into by them.[12]

---

[1] Id., s. 90.
[2] Id., ss. 90, 124. The by-laws must be under seal.
[3] Id., s. 9.
[4] Id., ss. 31, 32.
[5] Id., s. 10.
[6] Id., s. 45.
[7] Id., s. 68.
[8] Id., ss. 117, 119.
[9] Id., s. 161.
[10] Id., ss. 10, 119, 161.
[11] Id., s. 161. Printed copies can be bought of the queen's printers.
[12] Pearce v. Chamberlain, 2 Ves. Sr. 33; Crawford v. Hamilton, 3 Madd. 254; Bray v. Fromont, 6 id. 5, Crawshay v. Maule, 1 Swanst. 495; Tatam v. Williams, 3 Ha. 347.

An apparent exception to this rule exists in the case of mining partnerships. Mines are a peculiar species of property, and are in some respects governed by the doctrines of real property law, and in others by the doctrines which regulate trading concerns. Regarding them as real property, and their owners as joint tenants or tenants in common, each partner is held to be at liberty to dispose of his interest in the land without consulting his co-owners; and a transfer of this interest confers upon the transferee all the rights of a part-owner, including a right to an account against the other owners.[1] But even here, if the persons originally interested in the mine are not only part-owners but also partners, a transferee of the share of one of them, although he would become a part-owner with the others, would not become a partner with them in the proper sense of the word.

If partners choose to agree that any of them shall be at liberty to introduce any other person into the partnership, there is no reason why they should not, or why, having so agreed, they should not be bound by the agreement.[2] Persons who enter into such an agreement consent prospectively and once for all to admit into partnership any person who is willing to take advantage of their agreement, and to observe those stipulations, if any, which may be made conditions of his admission. Such an agreement as this is the basis of every partnership the shares in which are transferable from one person to the other. Those who form such partnerships, and those who join them after they are formed, assent to become partners with any one who is willing to comply with certain conditions.[3]

As observed in Lovegrove v. Nelson,[4] "to make a person a partner with two others, their consent must clearly be had, but there is no particular mode or time required for giving that consent; and if three enter into partnership by a contract which provides that on one retiring, one of the remaining two, or even a fourth person who is no partner at all, shall name the successor to take the share of the one retiring, it is clear that this would be a valid contract which the court must perform, and that the new partner would come in as entirely by the consent of the other two as if they had adopted him by name."

As an ordinary partnership is not distinguishable from the persons composing it, and as every change amongst those persons creates a new partnership, it follows that every time a partner transfers his

[1] See Bentley v. Bates, 4 Y. & C. 182.
[2] Lovegrove v. Nelson, 3 M. & K. 20.
[3] See Fox v. Clifton, 9 Bing. 119.
[4] 3 M. & K. 1.

share to a non-partner, the continuity of the firm is broken. In this respect such companies as are not mere partnerships on a large scale differ from ordinary firms, their continuance not being interrupted by changes amongst their members.[1]

Again, the assignee of a share in an ordinary partnership obtains nothing more than a right to have what is due in respect of the transferred share paid to him;[2] whereas the assignee of a share in a company acquires a right to become a partner to all intents and purposes, provided only he complies with such conditions, if any, as may be necessary for the admission of new shareholders generally.

Whether a share in a company is transferable at the will of its owner for the time being, or whether its transfer requires the consent of the other shareholders, or of the directors of the company, depends upon the constitution of each company. Speaking generally, even in those cases in which the consent of directors to a transfer is necessary, the obtaining of their consent is regarded so much as a mere matter of form, that the necessity for it does not practically affect the marketable value of the shares. Nor, it is conceived, can directors withhold their consent to a transfer without good reason; for the power of assenting or dissenting to a transfer is reposed in them as trustees, and they must exercise that power accordingly, and not capriciously.[3] At the same time, if, in refusing their consent to a transfer, they act *bona fide*, with a view to the protection of the interests of the company, the exercise of their discretion will not be interfered with.[4]

A consent to a transfer given and acted upon is not invalid on the ground that it has been given informally.[5]

In most companies payment of calls is a condition precedent to the exercise of a right of transferring shares. This subject will be adverted to hereafter.

As between a buyer and seller of shares, it is, by the rules of the Stock Exchange, the business of the buyer to procure the consent of the directors to a transfer.[6]

Shares in companies are not all legally transferable in the same way; some are transferable by deed only, some by writing not under seal,

[1] See Mayhew's case, 5 De G. Mc. & G. 887.

[2] See Smith v. Parkes, 16 Beav. 115.

[3] See Pinkett v. Wright, 2 Ha. 120.

[4] Taft v. Harrison, 10 Ha. 489; R. v. Liverpool and Manchester Rail. Co., 21 L. J. Q. B. 284.

[5] Bargate v. Shortridge, 5 Ho. Lo. Ca. 297; Taylor v. Hughes, 2 Jo. & Lat. 24.

[6] Stray v. Russell, 5 Jur. (N. S.) 1295; affirmed on appeal, see 6 Jur. (N. S.) 168. It was a very hard case. Compare Wilkinson v. Lloyd, 7 Q. B. 27.

some apparently by parol. The mode in which the shares of a given company are transferable depends on the constitution of the company, and on the statute if any, by which it is governed.

Shares in companies governed by the Joint-Stock Companies' Acts of 1856–8 are transferable by a writing which is required to be in a given form, and to be executed by the transferor and the transferee.[1]

Shares in companies governed by 7 and 8 Vict., c. 110, or the Companies' Clauses Consolidation Act, are transferable by deed only, and the same was true of shares governed by the Banking Act of 7 and 8 Vict., c. 113. Forms of transfer are given by each of these acts.[2]

The transfer of shares in other companies is not regulated by any general act of Parliament; and shares in cost-book mining companies, although usually transferred by some written document, are apparently transferable by parol only. Shares in what are called scrip companies are apparently transferable by the delivery of the scrip certificate.[3]

Whatever may be the legal method of transferring shares, and whether a formal deed is or is not requisite, it is the common practice in the share market for a seller of shares to sign a deed or instrument of transfer with the name of the transferee in blank. The buyer then inserts his own name, or without doing so, resells, and hands the blank transfer to the new purchaser who again either inserts his own name as the transferee, or resells and delivers the transfer, still in blank, to the purchaser from him and so on. The effect of executing transfers in blank, and handing them from one person to another, is very different with respect to different classes of shares. A deed executed by A, and purporting to transfer property to ——, *i. e.*, to nobody, is altogether inoperative, and consequently, if a shareholder in a company, the shares in which are transferable by deed only, executes a transfer of his shares in blank, he remains owner of the shares and the holders of the deed acquire no other title to the shares than a right to have them properly transferred.[4] The instrument in blank does not at law transfer the ownership in the shares to

[1] 19 and 20 Vict., c. 47, s. 20.

[2] 7 and 8 Vict., c. 110, s. 54; 8 and 9 id. c. 16, s. 14; 7 and 8 id., c. 113, s. 23. Several shareholders may transfer their shares to the same person by one deed, stamped as if the total consideration money was paid to them jointly. Wills v. Bridge, 4 Ex. 193.

[3] See Ex parte Barclay, 4 Jur. (N. S.) 1030, now reported in 26 Beav. 177; Ex parte Grisewood, 5 id. 1191; Ex parte De Pass, 7 W. H. 683; now reported in 5 Jur. (N. S.) 1191. As to the necessity of stamping written agreements for the sale of shares transferable without writing, see Knight v. Barber, 16 M. & W. 66.

[4] Hibblewhite v. M'Morine, 6 M. & W. 200; Humble v. Langston, 7 id. 517.

which it relates, even as between the vendor and the purchaser; nor does the purchaser, by taking such a transfer, contract any obligation at law to procure himself or any one else to be registered as a shareholder, or to indemnify the seller from the consequences of his continuing to be a shareholder as between himself and the company.[1] But although a blank deed is invalid as a deed, it by no means follows from the cases of Hibblewhite v. McMorine, and Humble v. Langston, that all transfers in blank are worthless. Those cases decide nothing more than that some shares, viz., those which can only be transferred by deed are not transferable by a document in which the name of the transferee is omitted. The principle of the cases in question may possibly extend to shares in companies governed by the Joint-Stock Companies Act of 1856; for the transfer of such shares is by statute required to be executed both by the transferor and by the transferee;[2] but there are shares, *e. g.*, shares in cost-book mining companies which are transferable without the intervention of any formal document, and a letter signed by a shareholder, and transferring his shares to ———, amounts, if delivered to a purchaser, to a transfer to him, and authorizes him to fill up the blank with any name he likes.[3]

A deed of transfer with a blank for the name of the transferee is, as a deed, as invalid in equity as at law, and the shares referred to in it remain in equity as at law the property of the transferor, unless the equitable ownership in them has been changed by some contract into which he has entered by himself or his agents.[4] But the invalidity of a transfer in blank does not invalidate a contract of sale, and it is that contract which determines the equitable ownership of its subject-matter. Now, as there is no law requiring a contract for the sale of shares to be by deed or even in writing, there is nothing to prevent a court of equity from holding a purchaser of shares to his bargain, and from decreeing him to accept the shares he has agreed to buy, and with them all the liabilities incident thereto. Consequently, whether a transfer in blank has been executed or not, a purchaser of shares will in equity be decreed at the instance of the seller to take his place as from the time of the making of the contract, or, in other words, to accept a proper transfer of the shares, to procure himself to be registered as a shareholder in respect of them, and to

[1] Humble v. Langston, 7 M. & W. 517; Sayles v. Blane, 14 Q. B. 205.
[2] 19 and 20 Vict., c. 47, s. 20.
[3] See Walker v. Bartlett, 18 C. B. 845.
[4] See Tayler v. Great Indian Rail. Co., 5 Jur. (N. S.) 881, and 1067, on appeal.

indemnify the seller from all liabilities accruing in respect of the same shares since the time when they were agreed to be sold.[1]

The forms of transfer given by the various acts are short, and are framed with a view to convenient registration, and although shares may be transferred by instruments in other forms, still if they are complicated, and differ substantially from those prescribed, the company need not register them.[2]

A transferee of a share does not become a shareholder, nor does a transferor of a share cease to be a shareholder until those forms and ceremonies, which by the constitution of each company are necessary to be observed, have been either duly complied with or waived by competent authority. The decisions on this subject having been already examined, need not be again adverted to.

The transferee of a share in a company acquires, as between himself and the company no greater rights than the transferor; and this doctrine has been carried so far that it has been held that a transferee is precluded from objecting to conduct which has been sanctioned or acquiesced in by his transferor.[3] The extent to which a transferee of shares takes upon himself the liabilities of the transferor is examined in other parts of the treatise; it may, however, be observed generally, that the transferee, as between himself and his transferor, takes the place of the latter, not only as regards what is passed, but also as regards what is to come.

The law relating to the sale of shares may usually be further adverted to in the present place, although in strictness its discussion belongs rather to a treatise on the contract of sale than to a work on partnership.

There is nothing illegal at common law in the sale of shares or scrip.[5] At the same time, if a company or projected company is itself illegal, the sale of its shares or scrip is illegal also.[6]

The statute of 7 & 8 Vict. 110, prohibited the sale of shares in a company governed by it until after the company had obtained a certificate of complete registration, and even then by any person not

[1] See Cheale v. Kenward, 3 De G. & J. 27; Wynne v Price, 3 De G. & S. 310; Shaw v. Fisher, 5 De G. Mac. & G. 596, affirming S. C., 1 Jur. (N. S.) 971, and 2 De G. & Sm. 11. In Jackson v. Cocker, 4 Beav. 59, a purchaser of scrip was held to be under no such obligations; but see Beckitt v. Bilbrough, 8 Ha. 188.

[2] Copeland v. North Eastern Rail. Co., 6 E. & B. 277; R. v. General Cemetery Co., id. 415.

[3] Ffooks v. South Western Rail. Co., 1 Sm. & G. 168.

[4] See Mayhew's case, 5 De G. Mc. & G. 837.

[5] See Ex parte Barclay, 4 Jur. (N. S.) 1030; Ex parte Aston, 5 id. 615 and 779; Ex parte Grisewood, id. 1191; Bagge's case, 13 Beav. 162.

[6] Josephs v. Pebrer, 3 B. & C. 639; Buck v. Buck, 1 Camp. 547.

registered as a shareholder;[1] but the statute is now repealed, except as to insurance companies, and the prohibition in question never extended to railway or other companies requiring the authority of Parliament.[2]

Shares in companies do not fall within the description "public or joint-stock or other public securities" contained in what is commonly called the Stock Jobbing Act, 7 Geo. II, c. 8.[3] But a contract for their purchase and sale where neither party intends to accept or deliver them, and they only intend to pay "differences" according to the rise or fall of the market, is void as a gaming or wagering contract within 8 & 9 Vict., c. 109, s. 18.[4]

Neither scrip nor shares are goods or chattels or interest in land within the Statute of Frauds, and a contract for the sale of them is therefore valid, although not reduced to writing and signed by either buyer or seller, or by any agent of either of them.[5] At the same time, if a contract for the sale of shares is reduced into writing, that writing is the proper evidence of the contract, and must, therefore, be properly stamped.[6] An agreement for the sale of scrip has been decided not to be an agreement made for or relating to the sale of goods, wares, or merchandise within the exemption in the Stamp Act, 55 Geo. III, c. 184, sched. pt. 3, tit. Agreement.[7]

Shares and scrip are properly described as goods and chattels in actions for their price.[8]

Scrip and shares are usually bought and sold through brokers,[9] and a person employing a broker to buy or sell shares for him is, in the absence of evidence to the contrary, presumed to authorize such broker to buy or sell in the manner and upon the terms usual amongst brokers. Now, brokers on the stock exchange are always, in their dealings with each other, treated as principals, and are as between each other considered as personally responsible for all contracts they

[1] 7 & 8 Vict., c. 110, s. 26; Ex parte Neilson, 3 De G. Mc. & G. 556.

[2] Young v. Smith, 15 M. & W. 121; Bousfield v. Wilson, 16 id. 185; Lawton v. Hickman, 9 Q. B. 563.

[3] Hewitt v. Price, 4 Man. & Gr. 355; Williams v. Tyre, 18 Beav. 366. See, too, Ex parte Turner, 3 De G. & J. 46, and the cases there cited.

[4] Grisewood v. Blane, 11 C. B. 539.

[5] Not goods and chattels, Humble v. Mitchell, 11 A. & E. 205; Tempest v. Kilner, 3 C. B. 249; Bowlby v. Bell, id. 284; Watson v. Spratley, 10 Ex. 222; Duncuft v. Albrecht, 12 Sim. 189. Not interests in land; see, in addition to these last case, Bligh v. Brent, 2 Y. & C. Ex. 268; Powell v. Jessop, 18 C. B. 336; Walker v. Bartlett, id. 845; Bradley v. Holdsworth, 3 M. & W. 422.

[6] See Knight v. Barber, 16 M. & W. 66.

[7] Id.

[8] Lawson v. Hickman, 9 Q. B. 563.

[9] See as to brokers, Robinson v. Kitchin, 21 Beav. 365; Baring v. Corrie, 2 B. & Ald. 137. In this last case, it is said brokers have no business to contract as principals; but has no application to share-brokers, as is evident from the cases alluded to in the text.

may make with each other. If, therefore, a person employs a broker to buy or sell shares for him, he impliedly authorizes such broker to contract to buy or sell as if he were himself a principal, and must consequently indemnify the broker against any loss which he may incur by reason of his having contracted in his own behalf, and of being afterward, without any default of his own, unable duly to complete his contract.[1] The following cases will serve to illustrate this doctrine:

In Sutton v. Tatham,[2] a person ordered a broker to sell for him 250 shares. The broker entered into a contract for their sale, and was afterward informed that a mistake had been made, and that fifty only were intended to be sold. The broker, not being enabled to deliver the shares which he had agreed to sell, was compelled to make good to the purchaser the difference between the price agreed upon and the price at which the purchaser had procured shares elsewhere. It was held that the broker was entitled to recover this difference from his employer.

In Bayliffe v. Butterworth,[3] the defendant instructed the plaintiff, a broker, to sell shares for him, which the plaintiff accordingly did. When the time came for the delivery of the shares to the purchaser, the defendant made default and did not furnish them. The plaintiff having been compelled by the rules of the stock exchange to pay the difference between the price agreed to be paid by the purchaser, and that actually paid by him for other shares, was held entitled to recover such difference from the defendant.

In these two cases the broker was employed to sell shares. In the next three he was employed to buy them.

In Bayley v. Wilkins,[4] the defendant requested the plaintiff, a broker, to buy shares for him, which the plaintiff accordingly did. At the time of their purchase a call had been made, but such call had not become payable. The plaintiff paid the amount of the call to the selling broker in pursuance of the rules of the stock exchange, and was held entitled to recover the money so paid from the defendant.

In Taylor v. Stray,[5] the defendant instructed the plaintiff, a broker,

---

[1] See, in addition to the cases cited, *infra*, Young v. Cole, 3 Bing. N. C. 724; Child v. Morley, 8 T. R. 610; Bowlby v. Bell, 3 C. B. 284; Simpson v. Rand, 1 Ex. 688.

[2] 10 A. & E. 27.

[3] 1 Ex. 425. Compare this with Bowlby v. Bell, 3 C. B. 284.

[4] 7 C. B. 886. See, as to the evidence to be adduced by a broker who seeks to recover a call paid by him, M'Ewen v. Woods, 2 Car. & K. 330

[5] 2 C. B. (N. S.) 175; see, too, Stray v. Russell, 5 Jur. (N. S.) 1295.

to buy some Royal British Bank shares for him. The defendant accordingly bought the shares, which were to be paid for on a future day. Before that day arrived the bank stopped payment, and the defendant refused to take or pay for the shares. The plaintiff thereupon paid for them in compliance with the rules of the stock exchange, and was held entitled to recover the money so paid from the defendant.

In Pollock v. Stables,[1] the plaintiff, in pursuance of the defendant's instructions, bought shares for him which the defendant neglected to take up. The broker who sold them consequently resold them, and thereby a loss was sustained. The plaintiff, who was also a broker, made good this loss, as he was compellable to do by the rules of the stock exchange, and he was held entitled to recover the amount he had paid from the defendant.

The above cases establish as a general doctrine that what a broker, employed in buying and selling shares for another person, is compelled by the rules of the stock exchange to pay, in consequence of the non-performance by his employer of the contract entered into on his behalf, is recoverable from him by the broker. The principle of the decisions in question does not, however, extend further than this, viz., that brokers are impliedly authorized by those who employ them, to do what is usual and customary amongst brokers in matters such as those they are employed about. The cases which have been noticed do not show that persons who employ members of the stock exchange are effected by the rules of the exchange without reference to the question of what is customary amongst its members; and in truth, to non-members, such rules are only important so far as they evidence usage. This is shown by the case of Westropp v. Solomon.[2] There, the defendant employed the plaintiff, a broker, to sell ten scrip certificates, which the plaintiff did. It afterward appeared that these certificates were forgeries, although neither the plaintiff nor the defendant had any suspicion that such was the case. The committee of the stock exchange made a rule to the effect that the purchasers of the spurious scrip should have a right to demand from the sellers not only repayment of the purchase-money, but also payment of an additional fixed sum. In compliance with this rule, the plaintiff paid to the purchaser from him the money which he had received from the purchaser, and also the additional sum fixed by the rule; but it was held that the plaintiff was only entitled to recover from the defendant the money which the purchaser himself could have recovered at

[1] 12 Q. B. 765. [2] 8 C. B. 345.

law, namely, the amount paid by him with interest; and it was held that the rule, having been made after the sale, formed no part of that usage of brokers by which the defendant was bound.

A broker instructed to buy shares of a particular kind fulfills his instructions if he buys what are commonly bought and sold as such shares in the share market. Thus, where a broker was instructed to buy "Kentish Coast Railway Scrip," and he bought what was known as such and was paid for it, it was held that he was not liable to refund the money he had received, although it turned out that what he had bought was scrip issued without due authority, and was, in fact, utterly worthless.[1] Upon the same principle, if a broker is told to buy shares and he buys scrip, he will be held to have pursued his authority, if nothing but scrip has found its way into the market, and such scrip has been usually bought and sold as shares, and there is nothing to show that the broker was to wait until shares were issued.[2]

If a broker is employed to buy shares, he impliedly undertakes that he will either procure them within a reasonable time, or return the money which may have been furnished to him for the purpose of paying for them. And until he has acted upon his authority to buy, it may be revoked, and the money paid to him be demanded back.[3] But this cannot be done after he has entered into a contract for their purchase, and become personally responsible for the due performance of that contract.[4]

Accounts sent in by share-brokers to their employers may be shown not to have included charges which ought to have been included, and this is true even where the persons to whom such accounts are sent have dealt with other people upon the faith of the accounts being full and correct.[5]

A broker employed to buy or sell shares in an illegal company, or in a company which by law is not in a position to issue shares, cannot recover from his employer either any commission on the purchase or sale, or any money expended for him on account of such shares.[6]

In an action by a purchaser of shares against a seller, for not transferring the shares bought, the purchaser must aver, and if the averment is traversed, prove — (1) that he was ready and willing to pay for the

[1] Lambert v. Heath, 15 M. & W. 486.
[2] Mitchell v. Newhall, 15 M. & W. 308.
[3] Fletcher v. Marshall, 15 M. & W. 755.
[4] M'Ewen v. Woods, 11 Q. B. 13.
[5] Dalls v. Lloyd, 12 Q. B 531.
[6] Josephs v. Pebrer, 3 B. & Cr. 639; Ex parte Neilson, 3 De G. Mc. & G. 556: see further as to illegal sales through brokers, Buck v. Buck, 1 Camp. 547, and Bousfield v. Wilson, 16 M. & W. 185, both of which have been noticed already.

shares,[1] and (2) that he tendered to the seller for his execution a proper instrument of transfer.[2] The necessity for such tender, however, only exists upon the supposition that some formal document is required to render the transfer of the shares complete, and upon the further supposition that the seller has not discharged the purchaser from making the tender.[3] Again, a seller suing a purchaser for not accepting shares must aver, and if necessary, prove, readiness and willingness on his, the seller's part, to transfer those shares to the purchaser.[4] The circumstances that a call is due upon shares agreed to be sold, and that they are not transferable so long as the call remains unpaid, do not disprove readiness and willingness on the part of the seller to transfer, if he was in fact ready and able to pay the calls in question.[5] But if the seller cannot obtain the assent of the directors to a transfer to the purchaser, and such assent is necessary by the company's regulations, the seller cannot be treated as ready and willing to transfer, he not being in fact able to do so.[6]

A reasonable time for the transfer of shares bought and sold is implied in the contract for sale, and where the sale is made through brokers, the rules of the Stock Exchange fixing the time within which shares sold are to be delivered are admissible in evidence upon the question what is reasonable time, although the buying and selling brokers are not proved to be members of the exchange.[7]

A contract for the sale and purchase of shares does not bind the purchaser to accept what does not answer the description of the shares which he agreed to buy. If, therefore, such shares do not exist, he is not compellable to pay the price agreed upon, and if he has paid it, he can recover it back as money paid for a consideration which has failed.[8]

In Kempson v. Saunders[9] it was held that a purchaser of shares in a projected company which was never formed, was entitled to recover back his money from the vendor, although the vendor was not an original subscriber, and had himself purchased the shares from other persons. This case was decided upon the ground that the subject-

[1] Lawrence v. Knowles, 5 Bing. N. C. 399. In Tempest v. Kilner, 2 C. B. 300, the averment of readiness and willingness was traversed too largely.

[2] Stephens v. De Medina, 4 Q. B. 422; Bowlby v. Bell, 3 C. B. 284; Green v. Murray, 6 Jur. 728, Q. B.

[3] Franklyn v. Lamond, 4 C. B. 637.

[4] Hannuic v. Goldner, 11 M. & W. 849.

[5] Shaw v. Rowley, 16 M. & W. 810.

[6] See Wilkinson v. Lloyd, 7 Q. B. 27. But, see as to its being the duty of the seller to obtain the consent of the directors, Stray v. Russell, 5 Jur. (N. S.) 1295, *post*.

[7] Stewart v. Cauty, 8 M. & W. 160.

[8] Watkins v. Huntley, 2 Car. & P. 410; Westropp v. Solomon, 8 C. B. 345.

[9] 4 Bing. 5. Compare Stent v. Bailis, 2 P. W. 217.

matter of the contract had no existence, there being no company, and consequently no shares in it to buy or sell. Had the contract been for the sale and purchase of the right of the vendor to shares in the company when it should be formed, it could hardly have been held that there was nothing to buy or sell, or that the purchaser could have recovered back his money, although he might not in fact have got any thing of the slightest value for it.

A person who sells shares in a company which he knows has no existence is guilty of a fraud for which he is criminally responsible.[1] But the rule *caveat emptor* renders it lawful for a person holding shares in an insolvent company to sell them to any one willing to buy them, and it is presumed that, in the absence of misrepresentation by the seller, the buyer is without remedy against him.[2]

Upon the sale of the shares the vendor is bound to do whatever is necessary to enable him to transfer them to the purchaser, and if the vendor makes default, so that the purchaser in fact never gets the shares, he is at liberty to rescind his contract and recover back his money.

In Wilkinson v. Lloyd,[3] the defendant had sold shares to the plaintiff, and had executed a deed transferring them, and signed a certificate stating that the plaintiff was the proprietor of them. The directors of the company, however, refused to recognize any transfer of any shares by the defendant, until an action pending between him and the company should be settled, and it was held that under these circumstances the plaintiff was entitled to have his purchase-money repaid to him.

The recent case of Stray v. Russell, however, shows that by the rules of the Stock Exchange it is not the duty of the seller of shares to procure their transfer to the purchaser, and that a person who buys shares through a broker may be compelled to pay for them, although the company may decline to accept him as a shareholder. This case, it is submitted, requires reconsideration.

It has been already seen that shares which are transferable only by deed do not pass by an instrument sealed by the seller, but having a blank for the name of a purchaser.[4] If, therefore, a person purchases such shares, and takes a transfer of them in blank, and then resells them, and the purchaser from him refuses to pay for them, an action

[1] See Macallum v. Turton, 2 Y. & J. 183.

[2] See Remfrey v. Butler, 2 Jur. (N. S.) 1297; Stray v. Russell, id. 1295.

[3] 7 Q. B. 27. See, also, Lloyd v. Crisp, 5 Taunt. 249. But compare Stray v. Russell, 5 Jur. (N. S.) 1295.

[4] See the cases in the next three notes.

by him for the purchase-money will fail,[1] as will also an action against the purchaser for not procuring himself to be registered as a shareholder and for not indemnifying the seller against subsequent calls.[2]

Whether shares are transferable by deed or without deed, it is the clear duty of a purchaser to whom shares have been, in fact, transferred, to procure himself to be registered as a shareholder in the place of his vendor, and to indemnify the latter against all calls made subsequently to the transfer, and although it has been held that subsequent calls paid by the seller cannot be recovered from the purchaser as money paid to his use,[3] it has been decided that they are recoverable in an action for not registering the transfer, and not indemnifying the transferor against the consequences of his name remaining on the books of the company.[4]

Shares are not unfrequently sold by auction. If the auctioneer sells shares, without disclosing the persons on whose behalf he sells, he will be personally responsible for the due completion of the sale, and will be liable to the purchaser in damages for the non-transfer of the shares to him.[5] Moreover if in such a case the auctioneer, when called upon to transfer the shares, refers the purchaser to the owners, it becomes unnecessary for the purchaser to tender a deed of transfer to the auctioneer before suing him, for by such a reference the auctioneer discharges the purchaser from tendering any deed of transfer to him.[6] If shares are sold subject to a condition that if they are not paid for by a certain time, the seller shall be at liberty to resell them, and shall be entitled to recover from the purchaser any loss sustained by the resale, and the shares are sold and resold under this condition, the first purchaser cannot be sued for shares bargained and sold, but the contract entered into by him must be declared on specially.[7]

In an action by the seller of shares against the purchaser for not accepting them, the damages are measured by the difference between the contract price and the market price at the time of the purchaser's breach of contract,[8] and it is for the jury to determine when this time

[1] See Hibblewhite v. M'Morine, 6 M. & W. 200.

[2] Humble v. Langston, 7 M. & W. 517; and see Sayles v. Blane, 14 Q. B. 205, and 6 Ra. Ca. 79.

[3] Sayles v. Blane, 14 Q. B. 205, and 6 Ra. Ca. 79.

[4] Walker v. Bartlett, 18 C. B. 845, reversing S. C., id. 446. See, too, Humble v. Langston, 7 M. & W. 517, and see the following cases in equity, Wynne v. Price, 3 De G. & S. 310; Shaw v. Fisher, 5 De G. Mac. & G. 596, affirming S. C., 1 Jur. (N. S.) 971, and compare Jackson v. Cocker, 4 Beav. 59. As to the right of a mortgagee to indemnity from his mortgagor, see Phené v. Gillan, 5 Ha. 1.

[5] Franklyn v. Lamond, 4 C. B. 637.

[6] Id.

[7] Damond v. Davall, 6 Q. B. 1030.

[8] Shaw v. Holland, 15 M. & W. 136; Stewart v. Cauty, 8 id. 160; Pott v. Flather, 5 Ra. Ca. 85.

was.[1] So, in an action by the purchaser of shares against the seller for not delivering them, the damages are measured by the difference between the contract price and the market price at the time when they ought to have been delivered.[2] Where, however, an action is brought for not re-delivering shares lent and agreed to be returned on a given day, the damages are measured by the market price of the shares at the time of the trial,[3] and the same rule is adopted in estimating damages in actions against companies for not delivering shares at the time they ought.[4]

A court of equity will decree a specific performance of a contract for the purchase and sale of shares,[5] and will compel the purchaser to pay the price, although it may have been expressed to be paid in the deed of transfer, if, in fact, it was not thus paid,[6] and will compel him to accept a transfer of the shares he has bought, and to indemnify the seller from all liabilities accruing subsequently to the sale,[7] and will compel the seller to account for any moneys he may have received from an improper subsequent sale to another person.[8] The court has, however, refused to compel a purchaser of scrip to accept shares, and indemnify the seller from calls upon them,[9] and to compel an allottee of shares to accept them, and execute the company's deed in respect of them,[10] and to compel the promoters of a company to deliver shares to a subscriber to the company.[11]

Before leaving the present subject it will be convenient to allude to the nature of the title a vendor of a share can be required to show. In Morris v. Kearsley,[12] the administrator of a deceased partner agreed to sell the share of the deceased in the partnership to his surviving partner, and to furnish him with an abstract of title to such share. The partnership property consisted in part of land, and it was held that the purchaser was entitled to such evidence of title as is usually given in sales of land, and that the letters of administration were not all that the vendor could be called upon to produce. In Stevens v.

[1] Id., and see Barned v. Hamilton, 2 Ra. Ca. 624.

[2] Tempest v. Kilner, 3 C. B. 253.

[3] Owen v. Routh, 14 C. B. 327. If the shares have been returned, the damages must be limited to the loss caused by their detention. Williams v. Archer, 5 C. B. 318.

[4] Cockerell v. Van Dieman's Land Co., 18 C. B. 454, and 1 C. B. (N. S.) 732.

[5] Cheale v. Kenward, 3 De G. & J. 27; Duncuft v. Albrecht, 12 Sim. 189; Shaw v. Fisher, 2 De G. & S. 11, and 5 De G. Mc. & G. 596.

[6] Wilson v. Keating, 5 Jur. (N. S.) 815, M. R.

[7] Wynne v. Price, 3 De G. & S. 310.

[8] Beckitt v. Bilbrough, 8 Ha. 182.

[9] Jackson v. Cocker, 4 Beav. 59. Compare this with the last case.

[10] Sheffield, etc., Gas Co. v. Harrison, 17 Beav. 294.

[11] Columbine v. Chichester, 2 Ph. 27. In this case, however, the promoters did not appear to have any shares which they could allot.

[12] 2 Y. & C. Ex. 139.

Guppy,[1] a partner in a mine had agreed to sell his share to a stranger, and the usual abstract and evidence of title were held to be requisite, and the purchaser was held not to have waived his objections to the title by entering into possession of the mine.

In Curling v. Flight,[2] the executor of a person, registered in the cost-books of several Cornish cost-book mining companies as the owner of shares therein, agreed to sell such shares, and he filed a bill against the purchaser for specific performance of the agreement. The executor contended that, in support of his title, he was only called upon to prove the entries in the cost-books, and the probate of the deceased shareholder's will; whereas the purchaser contended that he was entitled to evidence of the title of the companies themselves to the mines alleged to belong to them. The court partially adopted this view; and held that although the purchaser was not entitled to such evidence as is usually given on the sale of real estates, he was nevertheless entitled to know what title the companies had to the property they worked, and to be satisfied that the vendor really had something to sell besides shares on paper.

In Shaw v. Fisher,[3] a suit was instituted against the purchaser at an auction of certain railway shares, to compel him to complete his purchase; it was held that the defendant was not bound to complete without evidence of the vendor's title, and that a purchaser of shares was entitled to have the details of a chancery suit gone through, and a reference as to the plaintiff's title was accordingly directed. The vendor's bill was ultimately dismissed, on the ground that, after the sale to the defendant, the plaintiff had re-sold the same shares to another person, and had, therefore, abandoned the contract sought to be enforced against the defendant.

The case of Curling v. Flight is quite sufficient to render it prudent for a vendor of shares in a company to stipulate that he shall not be required to adduce any evidence of the title of the company to any property whatever, or any evidence of his own title, except the registry of himself as a shareholder in respect to the shares offered for sale.

Of the relinquishment of shares and of the right to retire.

SEC. 861. Subject to a qualification which will be presently men-

[1] 3 Russ. 171.

[2] 6 Ha. 41, and 2 Ph. 613. See Hare v. Waring, 3 M. & W. 362, as to evidence of title by entries in a company's books.

[3] 2 De G. & S. 11, and 5 De G. Mac. & G. 596, where a Master's report is given.

tioned, a member of an ordinary firm can surrender his share and interest in the firm to his copartners, or any of them, upon any terms to which he and they may agree. But there is only one method by which a partner can retire from a firm without the consent of his copartners, and that is, by dissolving the firm. In order to avoid the necessity of a general dissolution when a partner may wish to retire special provisions are frequently introduced into partnership articles, but it is not unfrequently found that, owing to unforeseen circumstances, these provisions cannot be carried into effect, and, when that is the case, a dissolution, with its usual consequences, must take place if a partner is to retire otherwise than by the consent of his copartners.[1]

The qualification above alluded to has relation to a partner's retirement from an insolvent firm. A partner desirous of retiring from an insolvent firm is at perfect liberty to sell his interest in it for any sum the continuing partners think proper to give him, and a sale by him to them cannot be set aside or impeached as a fraud upon the creditors of the firm, unless there be clear evidence *aliunde* of such fraud.[2] At the same time, the present share of a partner in an insolvent firm[3] is obviously less than nothing, whatever may be the amount of the capital brought in by him. Consequently, a partner who retires from an insolvent firm and withdraws from it a sum of money which he is pleased to call his share, is defrauding the creditors of the firm, and such a transaction cannot stand, and it may be impeached by the assignees in bankruptcy of the continuing firm.[4] To proceedings instituted by the assignees to impeach such a transaction it is no answer to say that the bankrupts themselves were bound by it, for the assignees represent the creditors, and can impeach any transaction which is a fraud as against them, although the bankrupts themselves might not be in a position to do so.[5] Upon similar grounds, if a party relinquishes his share in a partnership to his copartners upon such terms and under such circumstances as to render that relinquishment a fraud upon his creditors,

[1] See Cook v, Collingridge, Jac. 607; Kershaw v. Matthews, 2 Russ. 62; Madgwick v. Wimble, 6 Beav. 495; Downs v. Collins, 6 Ha. 418. Compare Simons v. Leonard, 3 Ha. 581; Pettyt v. Janeson, 6 Madd. 146.

[2] See Ex parte Peake, 1 Madd. 346; Parker v. Ramsbottom, 3 B. & C. 257; Ex parte Birch, 2 Ves. J. 260, note; Ex parte Carpenter, Mont. & McAr. 1.

[3] An insolvent firm is one in which the joint assets are less than the joint liabilities. Such a firm is insolvent whatever the wealth of the individual partners composing it may be. See Mont. & McAr.

[4] See Anderson v. Maltby, 4 Bro. C. C. 423, and 2 Ves. Jr. 244.

[5] Id., 2 Ves. Jr. 255; and see Biliter v. Young, 6 E. & B. 40; Tyrrell v. Hope, 2 Atk. 562.

and he then becomes bankrupt, his assignees will be entitled to rescind the transaction.

Laying aside, however, all such considerations as these it may be said:

1. That it is competent for a partner to retire with the consent of his copartners at any time and upon any terms;

2. That it is competent for him to retire without their consent by dissolving the firm, if he is in a position to do so;

3. That it is not competent for a partner to retire from a partnership which he cannot dissolve and from which his copartners are not willing that he should retire.

A shareholder may retire either by transferring his shares to a person who takes his place, or by relinquishing his shares to the company. The first mode of retiring was sufficiently considered in the last section, and it is, therefore, only necessary to allude in the present place to the subject of relinquishment or surrender of shares.

There can be no question that a shareholder may surrender or relinquish his shares, if all his coshareholders agree to his so doing, and, as regards cost-book mining companies, the right of a shareholder to retire from the company upon the relinquisment of his shares and payment of what may be due from him to the company is established by custom, and is, therefore, imported into the contract by which the members of such company are mutually bound.[1]

The assent of the shareholders to the retirement of any of them may be given generally, and once for all, or specifically on every occasion on which a shareholder seeks to retire, and it may, in either case, be given expressly or impliedly. Hence, the importance of ascertaining the practice of a company as regards the retirement of its members, for, although the written regulations of the company may be silent upon the retirement of members, and, although no express consent to some particular retirement may even have been obtained from all the members, yet such retirement may be valid on the ground that it is authorized and warranted by an agreement between all the shareholders evidenced by the practice of the company in other cases. Upon this principle it was held, in a recent case, that a shareholder in a cost-book mining company who had been allowed at a general meeting to surrender his shares without

[1] See as to this Fenn's case, 4 De G. Mac. & G. 285, and 1 Sm. & G. 26; Bodwin United Mines, 23 Beav. 370; Birch's case, 2 De G. & J. 10; Lofthouse's case, id. 69; Northey v. Johnson, 19 L. T. 104.

paying the arrears of calls upon him, had ceased to be a shareholder ;[1] for it was shown to have been the practice of the company to allow shareholders to retire upon any terms agreed upon at general meetings.

It must not, however, be concluded from this case that the retirement of a shareholder by surrendering his shares is one of those matters as to which a majority of members binds a minority, or as to which directors have any implied authority to represent the company. Both principle and authority are clearly opposed to any such doctrine.[2] Every partner and every shareholder is under obligations to all the others, from which he cannot be released without their consent, expressed or implied; and in the absence of evidence to the contrary, it cannot be inferred that the giving or withholding of consent to such an important matter as the discharge of a partner or shareholder from those obligations, has been intrusted by all the shareholders to some of them only, or to the persons deputed to carry on the business in which all are interested.

The authorities upon this point are numerous and conclusive. They relate more particularly to the question whether a shareholder who has relinquished his shares upon terms agreed upon between himself and the directors, or the majority at a meeting of the shareholders of a company, is or is not, upon the winding-up of the company, liable to be made a contributory; and the authorities alluded to have established that such a shareholder is liable to be a contributory unless his retirement is warranted by the constitution of the company, or has been authorized or sanctioned by all the members composing it. The following are the leading authorities upon this subject:[3]

Morgan's case.[4] The company's deed authorized the directors to buy up, out of certain specified funds of the company, any shares which might be offered for sale. An extraordinary general meeting resolved that if any shareholder should be desirous of withdrawing from the company, the directors should be at liberty to purchase his shares upon certain specified terms. A shareholder acted upon this

[1] Bodwin United Mines, 23 Beav. 370.

[2] The Plate Glass, etc., Co. v. Sunley, 8 E. & B. 47, is not inconsistent with this or with the cases referred to in the text; in that case the demurrer admitted that the company had accepted the surrender of the shares then in question.

[3] Compare them upon the effect of acquiescence, and the doctrine of estoppel by conduct, with Taylor v. Hughes, 2 Jo. & Lat. 24, and Bargate v. Shortridge, 5 Ho. Lo. Ca. 297.

[4] 1 De G. & S. 750, and 1 Mac. & G. 225. Richmond's Executor's case, 3 De G. & Sm. 96, and Lawes' case, 1 De G. Mac. & G. 421, were similar decisions with respect to other shareholders in the same company. Compare Kent v. Jackson, 14 Beav. 367, and 2 De G. Mac. & G. 49.

resolution, complied with the terms, and sold his shares to the company. But it was held that the resolution was not binding on the company, and that the shareholder in question was properly made a contributory, although nearly five years had elapsed since his withdrawal.

Stanhope's case.[1] The directors had power generally to act as might appear to them best for the interest of the company. A dispute arose amongst them, and one of them retired, and his shares were surrendered and canceled. It was held that his retirement was unauthorized, and he was put on the list of contributors ten years after his shares had been canceled.

Munt's case.[2] The directors of a company, disagreeing as to the mode of managing its affairs, and being divided into two parties, it was resolved that one of the two parties should retire, and that the other should take the management of the company and relieve the first from their liabilities. The directors composing one of the two parties did accordingly retire and relinquish their shares in favor of the company; but it was held that their retirement was altogether unauthorized and invalid, and that they were contributories on the winding up of the company.

These cases sufficiently establish the doctrine that in the absence of a special authority enabling them so to do, directors have no power to bind the company by buying each other out, or by buying out shareholders, or by accepting the surrender or relinquishment of shares to the company.[3] Moreover, if the directors of a company misapply its funds by buying up shares in the company, they are compellable to make good to the company not only the money actually so expended, but also the whole amount which was or would have become payable to the company by the holders of the shares bought up.[4] The company is entitled to require that the directors shall stand in the place of those whose shares they have wrongfully purchased with the moneys of the company.[5]

---

[1] 3 De G. & S. 198. See, too, Daniell's case, 22 Beav. 43, affirmed 3 Jur. (N. S.) 803; Walter's case, 3 De G. & S. 244; Holt's case, 1 Sim. (N. S.) 389; and compare Cockburn's case, 4 De G. & S. 177, and Busk's case, 3 id. 267, and observe the larger powers of the directors in the first, and the adoption of their acts in the last, of these two cases.

[2] 22 Beav. 55. See, too, Bennett's case, 18 Beav. 339, and 5 De G. Mac. & G. 284; Richmond's case, and Painter's case, 4 K. & J. 305.

[3] See, further, Harris v. North Devon Rail. Co., 20 Beav. 384; Walker's case, 2 Jur. (N. S.) 1216, L. J.; Playfair v. Birmingham, Bristol, etc., Co., 1 Rail. Ca. 640; Hodgkinson v. National Live Stock Ins. Co., 5 Jur. (N. S.) 478, and 960, now also reported in 26 Beav. 472; Burt v. British Nation. Co., id. 355 and 612.

[4] Evans v. Coventry, 2 Jur. (N. S.) 557, V. C. Kindersley; compare Kent v. Jackson, 14 Beav. 367, and 2 De G. Mac. & G. 49.

[5] Id.

It is necessary, however, to distinguish the retirement of a shareholder from the refusal of a person to be a shareholder in a concern which he never agreed to join;[1] and it has very properly been held that the principle of the above decisions does not apply to the case of a person who, having taken shares in a company formed for given objects, relinquishes such shares and retires from the company upon a change being made in those objects without his consent.[2]

It is further necessary to distinguish the retirement of a shareholder by relinquishing his share to the company, from his retirement by transferring his shares to some or one of the directors of the company upon their own individual account. For whilst in the absence of special authority, it is not competent for directors to accept on behalf of a company the surrender of shares held in the company, it is as competent for the directors of a company as for anybody else, to accept shares in the company from such shareholders as may be willing to transfer them in the ordinary way. Consequently an agreement between the directors and some of the shareholders of a company, to the effect that the latter shall relinquish their shares and transfer them to the directors, is not *ultra vires*, or in any way illegal, if the agreement is with the directors as individuals, and not with them as representing the company.[3] Upon the same principle, if a shareholder transfers his shares to a director as to an ordinary individual, and without notice that the director is acting on behalf of the company, the transferor does effectually retire from the company, although had he known that he was in fact surrendering his shares to the company, the surrender would have been invalid.[4]

Of the forfeiture of shares and of the right to expel.

SEC. 862. In the absence of an express agreement to that effect, there is no right on the part of any of the members of an ordinary partnership to expel any other member. Nor, in the absence of express agreement, can any of the members of an ordinary partnership forfeit the share of any other member, or compel him to quit the firm on taking what is due to him. As there is no method except a dissolution by which a partner can retire against the will of his copart-

[1] See Pim's case, 3 De G. & S. 11, and 1 Mac. & G. 291; Henessy's case, 2 Mac. & G. 201, and 3 De G. & S. 191, as to placing shares in a person's name without authority.

[2] Meyer's case, 16 Beav. 383.

[3] Haddon v. Ayres, 5 Jur. (N. S.) 408; see, too, Jessopp's case, 2 De G. & J. 638. See Barker v. Allen, 8 W. R. 127.

[4] See Hollwey's case, 1 De G. & S. 777; Bagge's case, 13 Beav. 162; Ex parte Nicol, 5 Jur. (N. S.) 205.

ners, so there is no method except a dissolution by which one partner can be got rid of against his own will.[1]

The consequence of this is, that when partners disagree and cannot dissolve except with the concurrence of all, it is not unusual for some of them so to conduct themselves toward another as, if possible, to drive him to agree to a dissolution. But it need hardly be said that a scheme of this kind will, if possible, be frustrated by a court of equity, which in such a case will interfere without dissolving the partnership.[2]

With a view to facilitate the removal of a partner who misconducts himself, it is not unfrequently agreed that a power to expel shall be exercisable in certain events and under certain restrictions. These expulsion clauses, as they are termed, will be alluded to hereafter in the chapter on the construction of partnership agreements; but it may be observed in passing, that such clauses are always construed strictly, and that no expulsion under them will be effectual unless the expelling partners have acted with the utmost good faith.[3]

Companies have no power to forfeit the shares of their members, or of subscribers who have not yet become members, unless such power is specially conferred upon them.[4] Moreover, a power to forfeit, specially conferred, must, in order to be effectually exercised, be pursued with the greatest exactness,[5] and must be exercised with perfect *bona fides;* for it is a trust the execution of which will be narrowly scanned by a court of equity.[6]

The right to forfeit shares is generally arrogated in cases where a shareholder will not pay to the company what is due to it from him in respect of his shares; and it is not an uncommon opinion amongst non-lawyers that a right to forfeit in such a case is possessed as a matter of course by directors. But this opinion is erroneous, for, as already stated, a right to forfeit exists only when specially conferred,

[1] See Hart v. Clarke, 6 De G. Mac. & G. 232, and on appeal, Clarke v. Hart, 6 Ho. Lo. Ca. 633; Crawshay v. Collins, 15 Ves. 226; Featherstonhaugh v. Fenwick, 17 id. 309.

[2] See Fairthorne v. Weston, 3 Ha. 387.

[3] See Blisset v. Daniel, 10 Ha. 493.

[4] Hart v. Clarke, 6 De G. Mac. & G. 232, and 6 Ho. Lo. Ca. 633; Norman v. Mitchell, 5 De G. Mac. & G. 648; Barton's case, 4 Drew. 535. As to companies partly English and partly foreign, see Ludlow v. Dutch Rhenish Rail. Co., 21 Beav. 43.

[5] See as to the insufficiency of notices, etc., Watson v. Eales, 23 Beav. 294; Van Diemen's Land Co. v. Cockerell, 1 C. B. (N. S.) 732; affirming Cockerell v. Van Diemen's Land Co., 18 C. B. 454; Edinburgh, Leith, etc., Rail. Co. v. Hebblewhite, 6 M. & W. 707; London and Brighton Rail. Co. v. Fairclough, 2 Man. & Gr. 674. Compare Graham v. Van Diemen's Land Co., 1 H. & N. 541.

[6] Harris v. North Devon Rail. Co., 20 Beav. 384; Richmond's case, and Painter's case, 4 K. & J. 305; Stubbs v. Lister, 1 Y. & C. C. C. 81.

and even a majority of shareholders cannot confer it unless empowered so to do by the company's act, charter, deed of settlement, or regulations.[1]

There is no authority for the proposition that by the custom which governs cost-book mining companies, the shares of a member of such a company can be forfeited for non-payment of calls or for not contributing to the expense of working the company's mine.[2]

The only general legislative enactments now in force,[3] which confer on companies the power of forfeiting the shares of their members, are the Companies Clauses Consolidation Act and the Joint Stock Companies Act of 1856, both of which require notice.

Suits in equity between joint-stock companies and strangers.

SEC. 863. The difficulties attendant upon suits in equity, in which joint-stock companies are concerned, arising from the great number of persons whose interests are affected, have as regards suits between the company and strangers, been greatly diminished by the power now very generally granted to them, to sue and be sued in their registered name or in the name of some public officer, and by the principle now recognized by the court of equity that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others.[4] But the greater number of cases between these companies and strangers appear to be suits by strangers seeking relief from the Court of Chancery against an alleged abuse of the great powers conferred on some of these companies by the authority of Parliament.

Grounds on which equity will interfere.

SEC. 864. In reference to the powers given to such of these companies as are incorporated by act of Parliament, Lord Cottenham made

---

[1] Barton's case, 4 Drew. 535, affirmed on appeal, 5 Jur. (N. S.) 420.

[2] See Hart v. Clarke, 6 De G. Mac. & G. 232, and 6 Ho. Lo. Ca. 633.

[3] The 7 & 8 Vict., c. 113, s. 37, provided for forfeiture, but the 7 & 8 Vict., c. 110 did not. Companies governed by this act possess the right of forfeiting shares under their deed of settlement, if they possess it at all. It may be lawfully provided in the deed that the shares of subscribers who will not execute it may be forfeited, and a forfeiture of the shares of a subscriber who has not executed the deed will in such a case be valid, Stewart v. Anglo-Californian Co., 18 Q. B. 736; Beresford's case, 2 Mac. & G. 197, and 3 De G. & S. 175; Bailey's case, 15 Jur. 29; but if there is no such clause it will be otherwise, Barton's case, 4 Drew. 535, and on appeal, 5 Jur. (N. S.) 420.

[4] "That where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others, is established." Lord Cottenham in Taylor v. Salmon, 4 Myl. & Cr. 142; see, also, the Vice-Chancellor's observations in Long v. Yonge, 2 Sim. 385.

the following observations in Webb v. The Manchester & Leeds Railway Company:[1] "The powers are so large, it may be necessary for the benefit of the public, but they are so large and so injurious to the interests of individuals, that I think it is the duty of every court to keep them most strictly within those powers, and if there be any reasonable doubt as to the extent of their powers, they must go elsewhere and get enlarged powers, but they will get none from me by way of construction of their act of Parliament.

These observations indicate the general principles upon which the Court of Chancery interferes, that principle being restrictive, not mandatory. It has been said indeed that though the court will not directly, and in terms, compel the performance of an act upon motion, yet there are many cases in which the effect may be indirectly obtained by an order merely restrictive,[2] and the cases of Robinson v. Lord Byron,[3] and Lane v. Newdigate,[4] have been cited as authorities for such a position. Upon these cases Lord Brougham made the following observations in the case of Blakemore v. The Glamorganshire Canal Navigation:[5] "The cases which seem to sanction an order for abating are very few, and in peculiar circumstances. An obstruction to the King's highway, or in a harbor which is *quasi* highway, has been ordered to be removed as a public nuisance at the suit of the Crown, as in the case mentioned by Lord Hardwicke,[6] to have been decided in Lord King's time (a case relating to a street near the exchange), and in the cases of the Bristol and Portsmouth harbors, and others in the Court of Exchequer. The East India Company v. Vincent,[7] where Lord Hardwicke decreed a wall to be pulled down, did not proceed upon the ground of nuisance, but agreement, and appears to have been, like Franklin v. Tuton,[8] not a case of injunction, but a decree on a bill for specific performance. On the other hand, in Ryder v. Bentham,[9] Lord Hardwicke said he never had known an order to pull down made on motion, and but rarely by decree; and Lord Thurlow, in another case,[10] though pressed with the order made by himself in Robinson v. Lord Byron,[11] and urged to direct that a ditch should be filled up, as well as the further digging restrained, would only grant the prohibiting part of the motion, and refused the ordering part. 'I do not,' said he, 'like granting these injunctions

[1] 4 Myl. & Cr. 120.
[2] Eden on Injunctions, 331.
[3] 1 Bro. C. C. 588.
[4] 10 Ves. 192.
[5] 1 Myl. & K. 188.
[6] Ambler, 160.
[7] 2 Atk. 83.
[8] 5 Mad. 469.
[9] 1 Ves. Sen. 543.
[10] 1 Ves. Jun. 140.
[11] 1 Bro. C. C. 588.

on motion. This ditch may be a mile long. Take an order that he shall do nothing more till answer, or further order.' This brings us then to Lane v. Newdigate,[1] which may be said to go to the very uttermost verge of all the former cases, and indirectly to order something to be done, by restraining the party from continuing to keep certain works out of repair. This case appears to have been ex parte, and not at all argued. Lord Eldon himself suggested the difficulty of making an order that the repairs should be done. Sir Samuel Romilly said it was no more, in effect, than Lord Thurlow had ordered in Robinson v. Lord Byron; but Lord Eldon appears to have thought otherwise, and he refused the order as prayed, directing it, however, in such a manner as to produce the same result, by making it 'difficult,' his Lordship said, 'for the defendant to avoid completely repairing the works.'"[2] And in that case, Blackmore v. The Glamorganshire Canal Navigation, it was held that, on an interlocutory application for an injunction, the court will not, unless in a very special case, grant the order in such a form as indirectly to compel some positive act to be done by the party enjoined.

In an earlier stage of the same case,[3] Lord Eldon made the following observations respecting the interference of the Court of Chancery with certain of these companies which have obtained the authority of Parliament: "I follow and adopt the expression of the Lord Chief Justice of the King's Bench, and I am glad to fasten myself in some measure on his great authority, and say that, when I look upon these acts of Parliament, I regard them all in the light of contracts made by the legislature, on behalf of every person interested in any thing to be done under them; and I have no hesitation in asserting that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than any thing in the whole system of administration under our constitution. Such acts of Parliament have now become extremely numerous, and from their number and operation they so much affect individuals that I apprehend those who come for them to Parliament do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing

[1] 10 Ves. 192.

[2] In Lane v. Newdigate, 10 Ves. 192, an order specifically to repair the banks of a canal, and stop-gates, and other works, was refused. But the effect was obtained by an order to restrain, impeding the plaintiff from navigating, using and enjoying, by continuing to keep the canals, banks or works out of repair, by diverting the water, or preventing it by the use of locks from remaining in the canals, or by continuing the removal of a stop-gate.

[3] Blakemore v. Glamorganshire Canal Navigation, 1 Myl. & K. 162.

else; that they shall do and shall forbear all that they are thereby required to do and forbear, as well with reference to the interests of the public, as with reference to the interests of individuals. It is upon this ground that applications are frequently made to stay operations, where a canal is in progress of formation. In such a case it may be of very little consequence to A B, whether the canal is brought to his lands through the lands of C D, or through those of E F; nevertheless, if the legislature has said the canal shall be brought to the lands of A B from the lands of E F, and not of C D, this court would never permit the parties to bring the canal to the lands of A B from the lands of C D; the parties are obliged to submit to the contract which the legislature has made for them. The result is, that the contract shall be carried into execution, and the King's subjects are compelled to submit to it, upon the notion that it will be for the public good; but they are not compelled to submit to any thing except what the legislature has said shall be done. I have, therefore, stated, and I have already more than once acted upon the doctrine, that if a deviation from the line marked out by Parliament were attempted, I would (unless the House of Lords were to correct me) stop the further making of a canal which was in progress; and, for this reason, that a man may have a great objection to a canal being made in one line, which he would not have to its being made in another, and particularly he might feel that objection in a case where parties, after obtaining from the legislature leave to do one thing, set about doing another. It may, I admit, be of no greater mischief to A B that the canal should come through the lands of C D, than through those of E F; but to that my answer is, that you have bargained with the legislature that you shall do the act they have authorized you to do, and no other acts. There is another consideration to which, I apprehend, this court would feel very much inclined to attend. Individuals come to the legislature and apply for a canal, or a railway act; and the legislature says, you shall have a canal, or railway, to run from such a point to such another point, thereby exposing many persons to infinite inconvenience, and in a great measure destroying the comfort of those who have property upon the line through which the canal or railway is to pass. I agree that parties must submit to that, if such be the will of the legislature: but I say that if individuals go to Parliament, and Parliament, on being satisfied that the railway or canal can be made at an expense of, say 100,000*l.*, closes with their application, and forms them into a

company, with power to raise money to that amount; that authority is given them by Parliament, in the full confidence that the sum which they have asked and obtained power to raise will enable them to execute the work. But, if a case arises in which parties have been enabled by Parliament to engage in an undertaking, on a representation that 100,000*l.* would enable them to complete it, and if they find afterward that 100,000*l.* is not enough for that purpose, this court would, I think, find it very difficult to allow them to proceed with the work until they had obtained further authority, and till they had satisfied Parliament that, though they had deceived the legislature in the first instance, they were entitled to obtain an extension of their powers. There is an agreement on the part of those who satisfy Parliament that they can and will do such a work for such a sum of money; and, upon the faith of that understanding, they get the authority to begin the work; but if they deceive Parliament, what right have they to complain if courts of justice will not allow them to go on with the deception?"

In Lee v. Milner,[1] Alderson, B., said: "These acts of Parliament have been called Parliamentary bargains made with each of the landowners. Perhaps, more correctly, they ought to be treated as conditional powers given by Parliament to take the land of the different proprietors through whose estates the works are to proceed. Each landholder, therefore, has a right to have the powers strictly and literally carried into effect as regards his own land, and has a right also to require that no variation shall be made to his prejudice in the carrying into effect the bargain between the undertakers and any one else. This I conceive to be the real view taken of the law by Lord Eldon in the case of Blakemore v. The Glamorganshire Canal Company,[2] to which I was referred. In that case that learned judge says: 'It may be of little consequence to A B, whether the canal is brought through the land of C D, or of E F; but if the legislature has said it shall be brought through the lands of E F, the Court of Chancery would enjoin them from bringing it through the lands of C D.' But this expression, I apprehend, means this, that only those lands of A B, which the legislature has given them authority to take, viz., those adjoining the lands of E F, shall be taken. This is, therefore, but the first branch of the proposition which I have stated, that the power given by Parliament as regards the lands of A B shall be strictly and literally performed. But Lord Eldon went further in that case and

[1] 2 You. & Coll. 611. [2] 1 Myl. & K. 162.

directed issues to be tried.' Those issues afford a proof of the second branch of my proposition. They were, 'whether the works done below and out of the plaintiff's lands would injure Mr. Blakemore's works.' But if the proposition contended for now had been true, that no variation at all could be allowed, this issue would have been wholly unnecessary. In Mr. Agar's case which was mentioned at the bar, one point, it was said, was that the Regent's Canal Company could not, for the sum which they had to raise, complete their works, and if that were clearly made out, Lord Eldon says, in the case before referred to, that the court of equity would probably grant an injunction, and I fully accede to that proposition in case the fact were clearly made out, and arose either out of circumstances occurring after the passing of the act, or from a failure to raise the sum contemplated by the act; for to take any man's land, where the whole work can never be performed, is clearly injurious to him, and a substantial breach of the condition on which the legislature granted the right to do it. So, again, if the termini were changed, and instead of proceeding to some great town or city the canal or railway were to terminate in some obscure village, the same result would follow. But I cannot accede to the proposition that where the contract, as far as regards the land of the complaining land-owner, is exactly performed, any variation made at a distant point, and with the consent of the land-owner there and producing no real injury to the complaining land-owner, ought to be the ground for an injunction in a court of equity to be granted at his application. This is the case here, and on this ground I should be prepared to discontinue the injunction."

But in Salmon v. Randall,[1] Lord Cottenham held that a person whose property is required by the commissioners appointed under the local acts of Parliament for improving the town of Cambridge, for the purposes of the act, is not entitled to restrain them by injunction from taking the steps prescribed by the acts for obtaining possession of the property, until they shall have shown a sufficient fund in hand to satisfy the price which may be awarded to him, or until they shall have shown the means by which they propose to procure it. In this case the Vice-Chancellor had granted an injunction to restrain the commissioners from proceeding to have the value of the property assessed before a jury. In the course of his judgment Lord Cottenham observed: "In support of his view the Vice-Chancellor referred to cases before Lord Eldon, The Mayor of King's Lynn v. Pemberton,[2]

[1] 3 Myl. & Cr. 439. [2] 1 Swanst. 244.

and Agar v. The Regent's Canal Company, which is mentioned in the note to that case. In the judgment of Lord Eldon, The Mayor of King's Lynn v. Pemberton, we have a statement by Lord Eldon himself of the ground on which he proceeded in the case of Agar v. The Regent's Canal Company. Lord Eldon there said: 'In the case of Agar v. The Regent's Canal Company, I acted on the principle that where persons assume to satisfy the legislature that a certain sum is sufficient for the completion of a proposed undertaking, as a canal, and the event is that that sum is not nearly sufficient, if the owner of an estate through which the legislature has given to the speculators a right to carry the canal can show that the persons so authorized are unable to complete their work, and is prompt in his application for relief, grounded on the fact, this court will not permit the further prosecution of the undertaking."[1] His Lordship then refers to another case which does not appear to me to have any application to the present. His words are: 'So, in another case a Mr. Taylor filed a bill, stating that at the time of subscribing he expected that, when he had paid the whole of his installments, he should find the canal complete, but that with the present fund it would not pass to the east of Hampstead, and the court thought him entitled to relief.' That must have been upon the ground of misrepresentation or fraud practiced on the party purchasing a share in the canal, and does not appear to me to be applicable.

"The case of Agar v. The Regent's Canal Company, however, undoubtedly lays down a principle which may be extremely important in its application, and I apprehend Lord Eldon must have gone upon this ground that where acts of Parliament impose certain severe burthens on individuals by interfering with their private rights and private property, for the purpose of obtaining some great public good, if the court sees that the undertaking cannot be completed, and, therefore, that the public cannot derive that benefit which was to be the equivalent for the sacrifice made by the individual, the court will protect the individual from being compelled to make that sacrifice, under the circumstances, and until it appears that the public will derive the proposed benefit from it. It is impossible to suppose that Lord Eldon could have meant that, after an act of Parliament has been passed giving certain powers, and authorizing a body of persons to carry on certain works, those against whose rights such works are to be carried into effect are to come into this court and say,

[1] 1 Swanst. 250.

'We will undertake to prove that you cannot, with the money which you have in hand, carry those works into effect;' and that, therefore, and immediately, in that state of circumstances the court is to interfere. If that were so, it is quite obvious that not a single bill passes the legislature, authorizing the formation of a railway or a canal, but would be brought immediately into this court, thus making it the duty of the court to investigate the probable expense of the speculation, and if it appeared that the money which the parties had at the time would not enable them, as in those cases, generally, it would not enable them, to carry their speculation into effect, the court would be called upon to say they should be prohibited from going on with it altogether.

"The consequence would be that this court would be assuming to itself a power which would be neither more nor less than the repealing of an act of Parliament. Lord Eldon, it is clear, could never have meant that, and he must, therefore, be supposed to have put his decision on the ground I have referred to. In the case of The Mayor of King's Lynn v. Pemberton, it appears that the defendants were not working on any lands belonging to the plaintiffs, and Lord Eldon refused the injunction. One reason stated in answer to the application was that, although there appeared to be a deficiency of funds to enable the company to complete their work, they were applying to Parliament to get further powers — not that they had obtained further powers, but that they were applying for them. Lord Eldon upon that observed, 'A peculiarity in this case is the pending application to Parliament.' I do not perceive how that can make any difference, because it is open to all companies, and to all parties, to apply to Parliament. If they get a new act, that might alter the case; but how the circumstance of the parties applying to Parliament was to give them a right which they would not have if they had not been making that application, I confess I do not understand. I cannot but think that, on further consideration, Lord Eldon was disposed to limit, and felt the necessity of limiting, the proposition which he is supposed to have laid down in Agar v. The Regent's Canal Company.

"The question then is, assuming the rule to be as Lord Eldon is supposed to have laid it down in the case of Agar v. The Regent's Canal Company, what application it has to the present. The principle of that case, taking it in the way assumed, was not that the company had no power to purchase the land they proposed to purchase,

but that they did not appear to have the means of carrying into effect the whole of the plan they had projected, and that, therefore, the ground on which they acted in taking from the individual the right of dominion over his own property could not be supported, and the consideration failed. Now, what analogy has that to the present case? There is no one individual object to be accomplished here; the powers of this act are for a variety of objects, all tending to the same effect. There is no one defined purpose to be carried into effect, but the commissioners are, from time to time, to be at liberty to exercise their powers for the purpose of widening and improving the streets of Cambridge. Every purchase they make, every house they take down, is a distinct work in itself, and, to that extent, accomplishes the object. The principle, therefore, of Lord Eldon's observations does not, as it strikes me, apply, in the slightest degree, to the present case. If Lord Eldon had laid it down that, wherever a public body of this description, wherever commissioners or an incorporated company propose to purchase or take any particular property, the court will see beforehand, before the contract is complete, before the sum to be paid is ascertained, not only that they have the means of paying for the property so proposed to be purchased or taken, but that the money which they have, and mean to apply for the purpose, is raised according to a particular mode prescribed by the act of Parliament, then such a proposition would come up to the present case. But no such proposition is laid down by his Lordship, and it would be quite a new principle to contend that a party who is under an obligation to sell his property, either under the provisions of an act of Parliament or otherwise, has a right to ask the purchaser, where did you get the money from, with which you are to pay for the property you are purchasing of me?"[1]

When will enjoin.

SEC. 865. The ordinary case of interference by injunction is where the company commit a direct breach of the contract they have made with the legislature, as by attempting a deviation of the line marked out by Parliament,[2] or taking land which they do not require for a *bona*

[1] In regard to partnerships in general, when a judgment has been obtained against the firm, a court of chancery will compel the creditor to exhaust the firm property before proceeding against that of the individual partners. In like manner, when a judgment has been recovered against an individual partner, chancery will compel the creditor to exhaust his private property, before he can proceed against his ultimate share in the property of the firm, which can be only ascertained upon a final settlement of accounts. In Ohio. Walker's Introd. to Amer. Law, 218–9.

[2] "I have stated, and I have already more than once acted upon the doctrine, that, if a deviation from the line marked out by Parliament were attempted, I would (unless the House of

fide purpose sanctioned by their act of Parliament.[1] The cases in which the Court of Chancery has interposed by injunction to restrain a company from exceeding the powers conferred upon it by act of Parliament, and that even though irreparable mischief is not shown to result from the proceedings of the company, are very numerous.[2]

In Bell v. The Hull and Selby Railway Company,[3] it was held, on motion to dissolve an injunction *ex parte* (which had been obtained on the ground of an alleged contravention of the 69th section of their act of Parliament), restraining the company from prosecuting any works which would render the plaintiff's wharf inconvenient for its purposes, until they had made another good and sufficient wharf, as convenient as the old wharf, or as near thereto as might be, that the injunction should be continued until after the trial of an action at law, on the question whether the plaintiff was entitled to have a wharf, such as he claimed, made for him, in which action it was to be admitted that the company had made a jetty as represented on a model produced by them. That the court would not, in the meantime, permit the defendants to proceed with their works, unless it was clear that the court would have jurisdiction to deal with such works as it should think proper after a trial at law. That the plaintiff in such a case is entitled to an injunction restraining the prosecution of works, notwithstanding these works are so far advanced that such prosecution thereof would not be further prejudicial to the plaintiff, and the only effect would be to restrain the company from completing the railway.

Although an injunction *ex parte* upon a statement in which material facts are concealed or misrepresented, would, on a speedy application, be dissolved with costs, yet that is not a sufficient ground for a motion to dissolve that injunction, after a period of several months has elapsed, before notice of such motion is given; nor will the question whether there has been such concealment or misrepresentation be taken into consideration on appeal from an order made by the court in which the injunction was granted, and by which order the injunction was continued and costs reserved.[4]

Lords were to correct me) stop the further making of a canal which was in progress." Lord Eldon in Blakemore v. Glamorganshire Canal Navigation, 1 Myl. & K. 163.

[1] Webb v. Manchester and Leeds Railway Company, 4 Myl. & Cr. 116.

[2] The River Dun Navigation Company v. The North Midland Railway Company, 1 Ra. Ca. 135; Spencer v. The London and Birmingham Railway Company, id. 159; Lord Petre v. The Eastern Counties Railway Company, id. 462; Gordon v. The Cheltenham and Great Western Railway Company, 2 Ra. Ca. 800 and 872.

[3] 1 Ra. Ca. 616.

[4] Id.

Ex parte injunctions.

SEC. 866. An injunction *ex parte* may be granted, notwithstanding that the defendant has appeared to the bill.[1] The general rule is that, after the defendant has appeared, a special injunction can be moved for only upon notice.[2] In Perry v. Weller,[3] a distinction is taken between a *gratis* appearance and an appearance entered upon service of the *subpœna*, but, where the threatened mischief is imminent, and would be irremediable, it seems the court has not required notice, even though the appearance has been the consequence of a *subpœna*.[4]

Will restrain excess of power.

SEC. 867. The Court of Chancery will also interfere by injunction to restrain these companies from committing a breach of a private contract by means of which they have been enabled to obtain their parliamentary powers. Thus where a person acting on behalf of the subscribers to a railway, who were then soliciting a bill in Parliament, for the purpose of forming them into an incorporated joint-stock company, entered into a contract with the trustees of a road, whereby it was stipulated, that in consideration of the trustees withdrawing their opposition in Parliament, and consenting to forego certain clauses of which they had intended to press for the insertion in the act, a formal instrument to the effect of the clauses should be executed under the seal of the company when incorporated, and the bill was accordingly allowed to pass unopposed and without the clauses, an injunction was granted at the suit of the trustees, to prevent the company from violating the provisions contained in the omitted clauses.[5] In the same case it was also decided that an agreement to withdraw or withhold opposition to a bill in Parliament is not illegal,[6] and that a court of equity will enforce a contract founded on such a consideration.

In the case of Stanley v. The Chester and Birkenhead Railway Company,[7] the Birkenhead and Chester Railway Company agreed with

[1] Bell v. The Hull and Selby Railway Company, 1 Ra. Ca. 623, and the cases there cited. In Allen v. Jones, 15 Ves. 605, Lord Eldon observed that if a person about to commit waste, and against whom a bill was filed, could, by appearing the evening before the motion, prevent it, he would get two days for cutting the timber.

[2] See the learned reporter's note to Acraman v. Bristol Dock Company, 1 Russ. & Myl. 321, and the cases there cited; see, also, Eden on Inj. 323.

[3] 3 Russ. 519.

[4] See the note to Acraman v. Bristol Dock Company, 1 Russ. & Myl. 321.

[5] Edwards v. The Grand Junction Railway Company, 1 Myl. & Cr. 650.

[6] It has since been decided by the Court of Exchequer Chamber, reversing a judgment of the Court of Queen's Bench, that such an agreement entered into by a Peer of Parliament is not illegal. Lord Howden v. Simpson, 2 Per. & D. 731; 1 Railway Cases, 347.

[7] 9 Sim. 264; 3 Myl. & Cr. 773.

the plaintiff to give him, for fourteen acres of land, 20,000*l.*, to be paid by installments; other parties, called the Chester and Birkenhead Railway Company, at the same time started a rival line, and both companies went to Parliament. In committee it was agreed that the merits of both lines should be referred to two members of the committee, and the solicitors for the rival companies at the same time signed an agreement, by which it was stipulated, that the adopted company should take the engagements with landholders into which the rejected company might have entered, and to this agreement the sanction of two members of each company, and also of the plaintiff was subsequently obtained, and was signified by a written memorandum of approval. The Chester and Birkenhead Company was adopted, and was incorporated by act of Parliament. Their line would require sixteen acres of the plaintiff's land in a different place.

The plaintiff filed a bill against the Chester and Birkenhead Company, stating these facts, and seeking to compel them to keep the agreement entered into by him with the Birkenhead and Chester Company, and to restrain the Chester and Birkenhead Company from entering upon any lands belonging to him, till after payment of the first installment, which was already due, and from proceeding, after subsequent installments became due, till such installments should have been paid. To this bill the defendants put in a general demurrer, which was overruled first by the Vice-Chancellor, and then on appeal by the Lord Chancellor, the latter (Lord Cottenham) observing that "the case, as it appeared on the face of the bill, was one of the grossest frauds he had ever seen attempted."[1]

Nor will the interposition of the court be confined to those cases where the contract broken is one by means whereof the company were enabled to obtain their parliamentary powers. Thus in a recent case,[2] where a lease of premises at the Swindon station, granted by the Great Western Railway Company to the plaintiffs for ninety-nine years, at a nominal rent, and expressed to be in consideration of the expense incurred by the plaintiffs in erecting certain refreshment rooms upon the premises, contained the following clause: "And it is hereby declared to be the intention of the said company, and the understanding of the lessees, that, in consequence of the outlay to be incurred by them in erecting the said refreshment rooms at Swindon, and preparing such other works as herein mentioned, the company

[1] 3 Myl. & Cr. 781. See, also, Doo v. The London and Croydon Railway Company, 1 Railway Cases, 257.

[2] Rigby v. The Great Western Railway Company, 10 Jur. 488.

shall give every facility to the said lessees for enabling them to obtain an adequate return, by means of the rents and profits to be derived from the said refreshment rooms, and that all trains carrying passengers, not being goods trains, or trains to be sent express or for special purposes, and except trains not under the control of the company, which shall pass the Swindon station, either up or down, shall, save in case of emergency or unusual delay arising from accident, stop there for the refreshment of passengers for a reasonable period of about ten minutes, and that, as far as the company can influence the same, trains not under the control of the company shall stop there for a like purpose, and the company hereby undertake not to do any act contrary to the above intention." And the lease also contained covenants on the part of the lessees to maintain the refreshment rooms in a suitable manner, and, on the part of the company, not to erect any refreshment rooms upon the line other than those erected by the lessees and those at the terminal stations. The plaintiffs, after expending considerable sums upon the premises, granted an underlease thereof to G, with whom they covenanted for quiet enjoyment, and that they would, during the continuance of the term granted to him, do all acts necessary for enforcing the fulfillment by the company of the agreements in their lease to the plaintiffs contained, and for giving full benefit and advantage to G of the refreshment rooms and premises thereby granted, in the same manner as if G were the assignee of the covenants contained in the lease to the plaintiffs, and G was thereby empowered to proceed, in the names of the plaintiffs, he indemnifying them against the costs, for the purpose of enforcing the fulfillment by the company of the agreements contained in their lease to the plaintiffs. Certain trains, which differed in no respect from the other trains of the company except in the rate at which they traveled, having passed the Swindon station by the direction of the company, without stopping for the refreshment of the passengers, the plaintiffs, without consulting G, filed their bill against the company, and moved for an injunction: It was held, first, in accordance with the decision of a court of law in an action directed for the purpose of the motion, that the clause in the plaintiff's lease providing for the stoppage of the trains at Swindon was a legal covenant, binding upon the defendant; secondly, that, as it would be impossible accurately to measure, in damages, the loss arising from a breach of the covenant, the case being one in which the plaintiffs could only recover such speculative damages as a jury might give them in repeated actions

against the company, the court had jurisdiction to enforce the specific performance of the covenant by injunction; thirdly, that the circumstance, that the lease contained covenants by the plaintiffs which might possibly thereafter be broken, was not a ground for refusing protection to them in the matter of the covenant in question; fourthly, that the defendants, for the purposes of the motion, must be considered as private individuals, and could not be heard to excuse a breach of contract with the plaintiffs upon the ground of convenience to the public; and, fifthly, that the fact that the suit was instituted without the previous authority or subsequent adoption of G was not a bar to the plaintiff's right to proceed therewith.

When injunction will be refused.

SEC. 868. But whatever may be the equity of a plaintiff with regard to the enforcement of a contract, if, after he is well aware of the alleged right, he, by his conduct, has led a party to believe that he had no intention to enforce the performance of the agreement, the court will not interfere on his behalf by injunction.[1]

A railway company will not be prevented by injunction from taking lands for purposes warranted by their act, on the ground that previously to the filing of the bill, and before the necessity of taking it for such purposes was made known to the owners, the company had endeavored to take the lands for other purposes not so warranted.[2]

Where a railway company, under the powers of their act, purchased a subsisting lease in lands, and gave a notice to the plaintiff, the owner of the reversion in fee, for summoning a jury to assess the value of the fee-simple and inheritance thereof, and the plaintiff filed his bill, insisting that the company were not authorized by their act to take more than a certain portion of the land, and praying an injunction to restrain them from proceeding to assess the value of the excess beyond that portion; it was held by the Vice-Chancellor, that inasmuch as the contemplated proceedings would, if the company were not authorized by their act to take the land in question, be a nullity, and inasmuch as the entry and possession of the plaintiffs as derivative lessees was lawful, and no case being made of any sudden grievous injury done to the inheritance, the motion for the injunction must be refused with costs.[3]

---

[1] Greenhalgh v. The Manchester and Birmingham Railway Co., 1 Ra. Ca. 68; 3 Myl. & Cr. 784.

[2] Webb v. The Manchester and Leeds Railway Co., 4 Myl. & Cr. 116; 1 Ra. Ca. 576.

[3] Mouchet v. The Great Western Railway Co., 1 Ra. Ca. 567.

Where a railway company made excavations upon their own land, which were intended to produce the partial diversion of the stream of a navigable river, and necessarily occasion the obstruction of a private road, and the plaintiffs, who were the owners of a fulling mill, supplied with water from the river, and had a right of way over the private road, alleged that the proposed diversion of the stream was illegal under the powers of the act, and also that the company were interfering with the road without fulfilling the preliminary condition imposed by the railway act, it was held that, although the company were working on their own land, the plaintiffs must be considered to have had notice of the intended works of the company, and had by an acquiescence for eighteen months, during which the company had expended a large sum of money on the works, precluded themselves from asking for the interposition of the court by injunction.[1]

Where the contract as regards the land of the plaintiff is exactly performed, any variation made at a distant point, and with the consent of the land-owner there, and producing no real injury to the plaintiff's land, will not be ground for an injunction in a court of equity, to be granted at his application.[2]

In the case of Eton College v. The Great Western Railway Company,[3] it was held by the Lord Chancellor, that there being nothing of a parliamentary contract between the parties, the company were entitled to exercise the powers given by the act in any manner not therein prohibited.

Suits in equity among the shareholders of joint-stock companies.

SEC. 869. The general rule with respect to parties, together with the exceptions to it, is thus stated by the Vice-Chancellor in the case of Long v. Yonge:[4] "The general rule is that all parties interested in the subject of the suit shall be parties to the record. Then there are certain exceptions, and those exceptions, as far as this particular point is concerned, may be divided into two parts. One exception is where several persons having distinct rights against a common fund, or against one individual, are allowed, a few of them, on behalf of themselves and the rest, to file a bill for the purpose of prosecuting their mutual rights against the common fund, or the individual liable to their demand. The other exception is, where a person may have a right against several individuals, who are liable to common obliga-

[1] Illingworth v. The Manchester and Leeds Railway Co., 2 Ra. Ca. 187; see, also, Aldred v. The North Midland Railway Co., 1 id. 404.

[2] Lee v. Milner, 2 You. & Coll. 611.

[3] 1 Ra. Ca. 200.

[4] 2 Sim. 385.

tions. In that case a bill is allowed to be filed by a single plaintiff against some but not all of those persons who are bound to make good the plaintiff's demand. This is the general division of the exceptions to the general rule." His Honor then came to the conclusion that the case before him, where some of the members of a partnership filed a bill on behalf of themselves and others, for a dissolution of the partnership, did not fall within either of those exceptions, but that all the members must be parties to the suit. "The cases that have been alluded to," said his Honor, "from Chancey v. May,[1] down to the present time, show to me, most distinctly, that if this bill asks to deprive 4,000 persons of their present rights, the plaintiffs ought not to be at liberty to stir in the case, until they have made every one of those individuals parties. That is my clear opinion, and I have no doubt whatever about it, and I think, therefore, that the demurrer must be allowed, and the costs must follow in the usual way."[2]

In Evans v. Stokes,[3] where the bill prayed that the affairs of a dissolved joint-stock company might be settled and wound up under a decree of the court, that accounts might be taken of the partnership property received by the defendants, the directors, and that the sale of the partnership property might be declared fraudulent and void, the Master of the Rolls said: "This is a bill in which it is sought that the affairs of the partnership may be wound up and settled by and under the decree of this court, and that accounts may be taken of the partnership property. The bill also prays that a sale of part of the partnership property by the directors to the defendant Betts may be set aside. It is perfectly obvious that a suit, where all the accounts of the partnership are to be taken, and the rights of all the partners are to be determined, as between themselves, and under the various circumstances in which they stand in relation to each other, some of them, for instance, having paid their calls, and others having omitted to do so, cannot be prosecuted in the absence of any of those partners. The cases in which suits have been permitted to be instituted by a few persons on behalf of themselves and a numerous body of other persons, have been cases in which there was plainly a community of interest between the plaintiffs and those whom they represented; but this is a case in which it is not disputed that there is a

[1] Prec. Ch. 592.

[2] A member of a corporation has a right of action against a corporate body, for any injury he sustains from the misconduct of its agents or officers. Gray v. Portland Bank, 3 Mass. 385; Waring v. Catawba Comp., 2 Bay (S. C.), 109.

[3] 1 Keen, 24.

great diversity of interests as between different classes of the members of this partnership, and yet the court is called upon to wind up the whole transactions of the partnership in the absence of a great number of the partners. The frame of the suit is plainly defective, and the cause must stand over, therefore, with liberty to the plaintiffs to amend by adding parties."

In Richardson v. Hastings,[1] Lord Langdale said: "I cannot say that I entertain any doubt of the propriety of the decision which I made in Evans v. Stokes.[2] I still think that the winding up of a partnership implies a complete settlement of all the rights and liabilities as between the parties themselves, and as they may be in conflict with regard to these rights and liabilities, the partnership cannot be finally wound up in the absence of all the partners. This may be attended with very great inconvenience, even to the extent of preventing the due administration of justice between the parties; but this appears to me necessarily to follow from the established rule of this court, which I have stated,[3] and which cannot be corrected without a general authority."

The "act to facilitate the dissolution of certain railway companies" is an example of the interposition of this "general authority" to correct this established rule of the court.

Dissolution when all partners cannot be present.

SEC. 870. But the statute above referred to only applies to "certain railway companies;" and the question naturally arises, "is there then no remedy for cases in which the plaintiff may be entitled to have a dissolution, and at the same time it may be impossible to have all the partners present?" To this question the following answer was given by Vice-Chancellor Knight Bruce in Richardson v. Larpent:[4] "It is impossible to suppose that the court would not meet the justice of such a case." In that case, the directors of a joint-stock company, consisting of 573 members, made certain calls, which the majority of the shareholders paid, but six of them, on the ground that the calls were improperly made, refused to pay them, and filed their bill on behalf of themselves and all others the shareholders, etc., except the defendants, against the directors, trustees and secretary of the company, praying for an account and sale of the partnership property for a receiver, for an injunction to restrain the defendants, and

[1] 7 Beav. 323.
[2] 1 Keen, 24.
[3] That all persons interested in the subject-matter of the litigation ought to be parties."
[4] 7 Jur. 691.

all officers and servants of the company, from dealing with the partnership property, for an account of the debts and liabilities of the company, and to have the property applied toward the payment of its debts and liabilities; it was held, that some at least of the absent shareholders, who had paid up the disputed calls, ought to be made parties to the suit. In the course of his judgment Vice-Chancellor Knight Bruce said: "One object of this bill is to obtain a dissolution, another to exempt the plaintiffs from the payment of a larger capital; but the larger body of dissentients are those who have contributed the increased amount of capital which is in dispute; and those plainly have, it seems to me, an interest that the plaintiffs should further contribute to the capital; but the plaintiffs desire that they should not contribute. It is too much to say that such an important proposition should be decided without an adequate number to maintain the other side. But only the directors and trustees are here, and none of those who only owe to the plaintiffs the simple duties of partner and partner. Considering, therefore, the nature of the questions agitated in this bill, assuming the answer to be true for this purpose only, I must say the suit is defective for want of parties. My present impression is, not that in every case where a dissolution is sought all the partners must of necessity be present, for I can conceive a case in which the plaintiffs may be entitled to have a dissolution and at the same time it may be impossible to have all the partners present. It is impossible to suppose that the court would not meet the justice of such a case. I do not say that all the parties dissentient should be here, but there must be enough to candidly and freely discuss and agitate the question, more so than the present defendant can do."

In the recent case of Sharp v. Day,[1] also before Vice-Chancellor Knight Bruce, on a bill filed by one of the provisional committee, on behalf of himself and all other parties, except the defendants, interested as partners,[2] in a railway company which had been projected, but in which no shares had been allotted, and which had been abandoned, for an account of the partnership debts and credits, and for winding up[3]

[1] 10 Jur. 469.

[2] But according to the present state of the law on this subject, there would, in this case, be clearly no partnership or *quasi* partnership. See the recent cases in the Court of Exchequer, Reynell v. Lewis, and Wyld v. Hopkins, 10 Jur. 972.

[3] The bill prayed that an account might be taken of the moneys and property belonging to the company or partnership, which had come to their hands or the hands of any person by their order or for their use, in trust for the partnership or company, and of all moneys which, by virtue of the resolutions come to by the parties, had been paid to or possessed by the defendants

the concerns of the company, a demurrer for want of equity and for want of parties was overruled, without costs and without prejudice to any question. Knight Bruce, V. C., said: "In this case the bill may, I think, be understood as alleging that the defendants are in possession of funds, in effect as trustees for purposes in the fulfillment of which the plaintiff and other persons, who are so numerous as to render the junction of them individually in a suit substantially incompatible with its prosecution, and on whose behalf and on his own he sues, are interested; and that the defendants have acted, and intend to act, in contravention of those purposes, and it prays relief upon that footing. Whatever I may think of the wisdom of instituting such a suit, as upon the face of this bill it appears to be, and assuming the professed objects of the bill to be the true objects,— whatever I may consider as being the probable fruit of this litigation,— I am apprehensive that if I allow the demurrer I shall be introducing a new rule, or, by making them more strict, altering old rules now in use. There seems to be enough to enable it to be said that the bill is not born dead. Whether it is likely to enjoy a prosperous, a long, or an easy life, is a different question. It is not, however, without doubt that I hold it to be at the present stage sustainable; nor is the question of the applicability of the principle upon which I proceeded in Richardson v. Larpent the only ground of doubt that I have. But doubting, I must allow the plaintiff to call for answers. Let the demurrers be overruled without costs, without prejudice to any question in the cause."

Account without dissolution.

SEC. 871. Lord Eldon did not evince any inclination to relax the strict rules of the Court of Chancery in favor of partnerships or companies consisting of a large number of members.[1] Succeeding

for the purpose of discharging the debts and liabilities of the company; that an account might be taken of the debts and liabilities of the partnership or company now remaining unsatisfied; that the outstanding property of the company or partnership might be collected and applied, under the direction of the court, so far as it would extend, toward the discharge of the debts and liabilities, and that, if necessary, a receiver might be appointed by the court to carry into effect the above purposes; that the defendants might be restrained from collecting or recovering the property or moneys of the company or partnership, or any part thereof, or from interfering therewith, or from applying any moneys or property paid or subscribed or hereafter to be so, in consequence of the resolutions, otherwise than under the direction of the court, in discharge of the debts of the company, and for the purposes for which such moneys had been subscribed; and that the defendants might be restrained from prosecuting an action at law against the plaintiff, or any other proceeding at law touching the matter aforesaid.

[1] See his Lordship's observations on joint-stock companies in Van Sandau v. Moore, 1 Russ. 441.

equity judges have, however, shown a disposition to adapt the practice and course of proceeding of the court, as far as possible, to the existing state of society.

In Mare v. Malachy,[1] where a bill was filed by a person who claimed a certain definite interest in a mine and mining adventure, as one of a number of copartners, stating that the defendants, who were the legal owners of the mine, and also copartners in the adventure, had subsequently, unknown to the plaintiff, but with the consent of the other copartners, and after fully accounting to such copartners for their shares of the profits up to that time, sold and conveyed the mine to trustees for a joint-stock company, the property of which was held by a numerous body of proprietors in transferable shares passing by delivery of the certificates, and had received the consideration for the sale, partly in money, and partly in shares in the joint-stock company, and praying that the defendants might, at the plaintiff's election, either account to the plaintiff for his proportion of the profits derived from the sale, or out of the shares in the joint-stock company in their hands, might transfer to him such a number of shares as would be equivalent to the interest which the plaintiff had in the original adventure; it was held by the Lord Chancellor, on an appeal against an order of the Vice-Chancellor allowing the demurrer, that a demurrer will not lie to such a bill on the ground that the other copartners in the original adventure, or the trustees or shareholders of the joint-stock company, are not made parties. In this case Lord Cottenham said: "I am clearly of opinion that the plaintiff has sufficiently stated upon the face of his bill a case which entitles me to hold that the persons in question are not necessary parties. It is very desirable not to be too strict in cases like the present, which are becoming more and more common every day. In the present instance, however, for the reasons I have stated, it is not necessary to make any relaxation of the strict rules of the court with respect to parties."

Again, in Taylor v. Salmon,[2] Lord Cottenham said, with reference to the same subject: "The appellant, however, sets up certain objections to the plaintiff's title to a decree; and first he objects that all the members of the company on whose behalf the bill is filed are not parties to the suit. I have before taken occasion to observe[3] that I thought it the duty of this court to adapt its practice and course of

[1] 1 Myl. & Cr. 559.
[2] 4 Myl. & Cr. 141.
[3] Mare v. Malachy, 1 Myl. & Cr. 559.

proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict adherence to forms and rules established under very different circumstances, decline to administer justice, and to enforce rights for which there is no other remedy. I am not, however, in this case called upon to act upon this principle, as I find decisions already made which are amply sufficient to support the plaintiffs' right to sue in the form they have adopted. That where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others, is established."

In the case of Wallworth v. Holt,[1] where a bill was filed by some of the shareholders of an insolvent joint-stock bank, on behalf of themselves and all other shareholders, except the defendants, against the directors, some of whom were bankrupt, and the trustees and public officers of the company, and certain shareholders, who were alleged to have not paid up their calls, praying that an account should be taken of all the partnership assets, and that such part as was outstanding might be got in by a receiver, and the whole converted into money, and applied toward the satisfaction of the partnership debts, a demurrer for want of equity, want of parties, and multifariousness, was overruled. In his judgment Lord Cottenham entered into a very full examination of the authorities on this subject and also of the principle on which they proceeded. "The case stated by the bill," observed his Lordship, "which is filed by the plaintiffs on behalf of themselves and all other the shareholders and partners of the banking company called the Imperial Bank of England, except those who are made defendants, is shortly this: that they are shareholders, and have paid all the calls made, which amount to 15*l.* per share; that the business of the company has been suspended since 1839, but that it has not been dissolved; that large debts are due by the company, for which they and the other shareholders are liable, and that there are considerable assets in the hands of the directors and trustees, though not equal to the debts; that all the directors, except one, have become bankrupts, and have thereby, by their regulations, become incapable of acting, and that the trustees refuse to act; and that the other defendants are the only shareholders who have not paid their calls; and it therefore prays for the assistance of this court to relieve

[1] 4 Myl. & Cr. 619.

them from this difficulty, by causing the assets of the company to be realized, and the debts to be paid; and that for this purpose a receiver may be appointed, and authorized to sue for calls unpaid, and other debts due to the company, in the name of the registered officer, under 7 Geo. 4, c. 46, who is one of the defendants.

"When it is said that the court cannot give relief of this limited kind, it is, I presume, meant that the bill ought to have prayed a dissolution, and a final winding up of the affairs of the company. How far this court will interfere between partners, except in cases of dissolution, has been the subject of much difference of opinion, upon which it is not my purpose to say any thing beyond what is necessary for the decision of this case; but there are strong authorities for holding that to a bill praying a dissolution all the partners must be parties, and this bill alleges that they are so numerous as to make that impossible. The result, therefore, of these two rules would be, the one binding the court to withhold its jurisdiction except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it; that the door of this court would be shut in all cases in which the partners or shareholders are too numerous to be made parties, which, in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of the realm in some of the most important of their affairs. This result is quite sufficient to show that such cannot be the law, for, as I have said upon other occasions,[1] I think it the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy. This has always been the principle of this court, though not at all times sufficiently attended to. It is the ground upon which the court has, in many cases, dispensed with the presence of parties who would, according to the general practice, have been necessary parties. In Cockburn v. Thompson,[2] Lord Eldon says, "A general rule, established for the convenient administration of justice, must not be adhered to in cases in which, consistently with practical convenience, it is incapable of application;" and again, "The difficulty must be overcome upon this principle, that it is better to go as far as possible toward justice than to deny it altogether." If, therefore, it were necessary to go much

[1] See Mare v. Malachy, 1 Myl. & Cr. 559; Taylor v. Salmon, 4 id. 134.

[2] 16 Ves. 321.

further than it is, in opposition to some highly sanctioned opinions, in order to open the door of justice in this court to those who cannot obtain it elsewhere, I should not shrink from the responsibility of doing so; but, in this particular case, notwithstanding the opinions to which I have referred, it will be found that there is much more of authority in support of the equity claimed by this bill than there is against it. It is true that the bill does not pray for a dissolution, and that it states the company to be still subsisting; but it does not pray for an account of partnership dealings and transactions, for the purpose of obtaining the share of profits due to the plaintiffs, which seems to be the case contemplated in the opinions to which I have referred; but its object is to have the common assets realized and applied to their legitimate purpose, in order that the plaintiffs may be relieved from the responsibility to which they are exposed, and which is contrary to the provisions of their common contract, and to every principle of justice. But whether the interest of the plaintiffs in right of which they sue arises from such responsibility or from any other cause cannot be material, the question being, whether some partners, having an interest in the application of the partnership property, are entitled, on behalf of themselves and the other partners, except the defendants, to sue such remaining partners in this court for that purpose, pending the subsistence of the partnership; and if it shall appear that such a suit may be maintained by some partners on behalf of themselves and others similarly circumstanced against other persons, whether trustees and agents for the company or strangers being possessed of property of the company, it may be asked why the same right of suit should not exist when the party in possession of such property happens also to be a partner or shareholder.

In Chancey v. May[1] the defendants were partners. In the Widow's case, before Lord Thurlow, cited by Lord Eldon,[2] the bill was on behalf of the plaintiffs and all others in the same interest, and sought to provide funds for a subsisting establishment. In Knowles v. Houghton, 11th July, 1805, reported in Vesey,[3] but more fully in Collyer on the Law of Partnership,[4] the bill prayed an account of partnership transactions, and that the partnership might be established, and the decree directed an account of the brokerage business, and to ascertain what, if any thing, was due to the plaintiff in respect thereof, and the Master was to inquire whether the partnership

[1] Prec. Ch. 592.
[2] 17 Ves. 15.
[3] 11 Ves. 168.
[4] P. 198, 2d ed.

between the plaintiff and the defendant had at any time, and when, been dissolved, showing that the court did not consider the dissolution of the partnership as a preliminary necessary before directing the account. In Cockburn v. Thompson[1] the bill prayed a dissolution, but it was filed by certain proprietors on behalf of themselves and others, and Lord Eldon overruled the objection that the others were not parties. In Hichens v. Congreve,[2] the bill was on behalf of the plaintiff and the other shareholders against certain shareholders who were also directors, not praying a dissolution, but seeking only the repayment to the company of certain funds alleged to have been improperly abstracted from the partnership property by the defendants, and Sir Anthony Hart overruled a demurrer, and his decision was affirmed by Lord Lyndhurst. In Walburn v. Ingilby[3] the bill did not pray a dissolution of partnership, and Lord Brougham, in allowing the demurrer upon other grounds, stated that it could not be supported upon the ground of want of parties, because a dissolution was not prayed. In Taylor v. Salmon[4] the suit was by some shareholders, on behalf of themselves and others, against Salmon, also a shareholder, to recover property claimed by the company which he had appropriated to himself, and the Vice-Chancellor decreed for the plaintiff, which was affirmed on appeal. The bill did not pray a dissolution, and the company was a subsisting and continuing partnership. That case and Hichens v. Congreve differ from the present in this only, that in those cases the partnerships were flourishing and likely to continue, whereas in the present, though not dissolved, it is unable to carry on the purposes for which it was formed, an inability to be attributed in part to the withholding that property which this bill seeks to recover. So far this case approximates to those in which the partnership has been dissolved, as to which it is admitted that this court exercises its jurisdiction. This case also differs from the two last-mentioned cases in this, that the difficulty in which the plaintiffs are placed, and the consequent necessity for the assistance of this court is greater in this case; no reason, certainly, for withholding that assistance.

"How far the principles upon which these cases have proceeded is consistent with the doctrine in Loscombe v. Russell,[5] 'that in occasional breaches of contract between partners, when they are not of so grievous a nature as to make it impossible that the partnership should

[1] 16 Ves. 321.
[2] 4 Russ. 562.
[3] 1 Myl. & K. 61.
[4] 4 Myl. & Cr. 134.
[5] 4 Sim. 8.

continue, the court stands neuter, will be to be considered if the case should arise. It is not necessary to express any opinion as to that in the present case; but it may be suggested that the supposed rule that the court will not direct an account of partnership dealings and transactions, except as consequent upon a dissolution, though true in some cases, and to a certain extent has been supposed to be more generally applicable than it is upon authority, or ought to be upon principle. It is, however, certain that the supposed rule is directly opposed to the decision of Sir J. Leach in Harrison v. Armitage,[1] and Richards v. Davies."[2]

The principles thus enunciated by Lord Cottenham have been recognized and acted upon to their fullest extent by the Master of the Rolls in Richardson v. Hastings.[3] In this case the demurrer having been allowed on the ground that to a suit seeking to wind up the affairs of a club or partnership all persons interested must be made parties, however numerous they may be,[4] the plaintiff amended his bill and struck out that part of the prayer which implied a winding up of the affairs of the club, and the demurrer was overruled, but without costs. In this case Lord Langdale, M. R., made the following observations:

"All cases of this kind are attended with some degree of difficulty, and the conclusion to be arrived at depends on rather nice circumstances. The arguments in support of a demurrer of this kind have generally a very strong foundation, because cases of this kind always deviate from two old and general rules of the court; one is, that all persons interested in the subject-matter of the litigation ought to be parties; the other is, that the court endeavors to do complete justice in every case, so that the matters involved in the suit may not be left open to future litigation.

"Now the present bill is, to a certain extent, a departure from both these rules, because it is proposed to be prosecuted in the absence of parties interested in the suit, and it also proposes that the sums to be recovered should be left at their disposal if they can agree, and if not, then that they may be left for future litigation. However, exceptions to the two rules which I have stated, have at all times been sanctioned. I recollect a treatise, in which one of the chapters was headed, 'In what cases necessary parties may be dispensed with.'

[1] 4 Mad. 143.
[2] 2 Russ. & Myl. 347; see, also, Mitf. Pl., 4th ed. 170, n. *a*, and the cases there cited.
[3] 7 Beav. 323.
[4] Id. 301.

The assumption that necessity could admit of any qualification may seem to imply that exceptions to the ordinary rule were admitted with difficulty.

"It has, however, become necessary to extend the cases of exception, so as to keep pace with the progress and complications of the transactions of mankind, and every body who reads what Lord Cottenham has said on more than one occasion, must be perfectly satisfied with the justice of his observation,[1] and see how necessary it is for this court, acting always within the limits of its jurisdiction, by an application of its powers, so necessary for the administration of justice, to adapt its forms of proceeding to the altered circumstances of society in our own times, and modify its rules so as to meet the changes of circumstances under which it is, at the present day, called on to administer justice. In no class of cases has the extension of the exception been more frequent than in cases like the present.

"I cannot say that I entertain any doubt of the propriety of the decision which I made in Evans v. Stokes.[2] I still think that the winding up of a partnership implies a complete settlement of all the rights and liabilities as between the parties themselves, and as they may be in conflict with regard to these rights and liabilities, the partnership cannot be finally wound up in the absence of all the partners. This may be attended with very great inconvenience, even to the extent of preventing the due administration of justice between the parties; but this appears to me necessarily to follow from the established rule of this court, which I have stated, and which cannot be corrected without a general authority. It was at one time supposed, that in consequence of the second general rule, that complete justice must be done with respect to the subject-matter, the court could not, and would not, interfere at all as between partners, unless the partnership was to be dissolved and finally wound up and settled; and there are several conflicting cases in the books on that subject, different judges having entertained very strong opinions and very different views on that question.[3] I noticed, on the former occasion, that it now appears very clear that there is no such rule. It has been decided, that in a continuing partnership, if a few have an interest in a particular subject,

[1] See Mare v. Malachy, 1 Myl. & Cr. 579; Taylor v. Salmon, 4 id. 141; Wallworth v. Holt, id. 635.

[2] 1 Keen, 24.

[3] See Forman v. Homfray, 2 Ves. & B. 329; Harrison v. Armitage, 4 Mad. 143; Marshall v. Coleman, 2 Jac. & W. 266; Richards v. Davies, 2 Russ. & Myl. 347; Loscombe v. Russell, 4 Sim. 8; Knebell v. White, 2 Y. & Col. (Exch.) 15; Bentley v. Bates, 4 id. 182; Miles v. Thomas, 9 Sim. 609; Fairthorne v. Weston, 3 Hare, 387.

adverse to all the rest, and claim for themselves the benefit of that interest, a bill may be filed against those few by one or more partners on behalf of themselves and all the rest. That is a remarkable instance of a case where all persons interested are not brought before the court; however, it is not much more remarkable than the cases where one creditor or one legatee is permitted to sue on behalf of himself and many other persons and some other similar cases. The court has even gone to this extent; in the case of an insolvent partnership not formally dissolved, it has permitted a bill to be filed by one or more on behalf of the rest, against the governing body, to have the assets collected, and applied as far as they would go toward the discharge of the debts, and that without seeking to ascertain the rights and liabilities of the parties as between themselves, and consequently leaving litigation as between those parties entirely open, after the debts have been paid; that is, it has sanctioned a suit which sought nothing but to compel a satisfaction *pro tanto* of the partnership debts, as far as the deficient assets would extend, and then leave all the members of the partnership exposed to such litigation as the unsatisfied creditors might choose to adopt for the recovery of the remainder of their debts, and also leave the partners liable, as amongst themselves, to such suits for contribution as the particular circumstances of the case might render necessary."

The principle that in cases of joint-stock companies a bill may be sustained for an account without seeking a dissolution and without making all the shareholders of the company parties has been subsequently recognized and acted upon in various cases.

Thus in Wilson v. Stanhope,[1] on a bill filed by a shareholder in a railway company, duly provisionally registered, against the members of the provisional committee complaining of the conduct of the committee in abandoning one line of railway in favor of another, and praying an account of all costs of the abandoned line; and of all moneys received as consideration for the abandonment of it, and praying other relief, a demurrer for want of equity and for want of parties, for that the other shareholders were not joined in the suit, was overruled, without prejudice to any question in the cause, and the costs reserved. Knight Bruce, V. C.—"The failure of the demurrer for want of equity in this case is too manifest to require any remark. The only other around alleged by way of demurrer is the want of parties. The bill states various circumstances of alleged misconduct on the part of the persons

[1] 10 Jur. 421.

to whom the whole scheme, and the steps toward the perfection of that scheme, were intrusted. It alleges, that improper acts have been done or acts of such a nature, and to such an extent improper, as to render it impossible to pursue the scheme. It alleges besides the matters of detail to which I have referred, that the moneys of the plaintiff, and of the other shareholders on whose behalf the plaintiff sues, have been obtained by fraud and misrepresentation, and for a purpose which has wholly failed. The latter part of the record runs thus: 'Charges that the number of shareholders in the said London and Manchester Direct Independent Railway (Remington's Line) is so great, and the rights and liabilities of the shareholders are so subject to change and fluctuation by death and otherwise, that, save as herein stated, plaintiff does not know, and is wholly unable to discover the names of the other shareholders, and, even if plaintiff were able to discover their names, it would not be possible without the greatest inconvenience to make them parties to the suit, and so to do would render it impossible to bring this suit to a hearing. Charges that the interest of the said shareholders, except the said defendants, are identical with those of the plaintiff in respect of the matters herein stated or in respect of the property of the said company and the surplus thereof, and all the said shareholders other than the said defendants are fully represented by the plaintiff, and have a common interest in the relief hereby prayed.' As to the non-ability to discover the names of the shareholders, I consider that so much of the charge as I have read must, for the present argument, be rejected by reason of the late act of Parliament referred to by Mr. Cooper, for the registration of joint-stock companies. I think that the allegation of ignorance is one that must be rejected, but that the allegation that a greater number remains, although there may possibly be cases in which that allegation would be too vague and loose, yet, when it is considered as applying to such an amount as those in question here, it does appear to me not too wide or vague. But, with regard to the latter part of these charges, I am of opinion that upon this record the principle which one of our greatest judges has laid down, and upon which he acted in the case of Cockburn v. Thompson,[1] renders it necessary to overrule the demurrer for want of parties. It is not, however, necessary positively to decide that because it is the rule of the court formerly practiced more generally than it is at present, or has been of late years, that upon a demurrer where the question is one of any nicety or diffi-

[1] 16 Ves. 321.

culty, it is not necessary to pronounce a final or conclusive opinion, but that if the court sees that it is matter of difficult argument or of reasonable discussion, it may and often does overrule the demurrer, saving the benefit of the question raised by it till the hearing of the cause, or, in other language, without prejudice to the question. That is the course I propose to take here to overrule the demurrer without prejudice to any question in the cause, and shall reserve the costs, unless the plaintiff can show that they ought to be disposed of now."[1] In Lewis v. Billing,[2] a demurrer for want of equity and for multifariousness was overruled. In Columbine v. Chichester,[3] a demurrer for want of equity was overruled by the Vice-Chancellor; but allowed on appeal by the Lord Chancellor,[4] on the ground that it did not appear from the statements in the bill that the defendants had any shares or scrip certificates which they could deliver to the plaintiff. The Lord Chancellor intimated that, if the bill had distinctly alleged that the defendants had in their hands the scrip certificates asked to be delivered to the plaintiff, the case would probably have fallen within the decision of the Master of the Rolls in Jackson v. Cocker.[5] In that case it was held that the purchaser of "scrip certificates" in a proposed railway company which had not obtained any act of Parliament, was not bound after the act had passed, and in the absence of any special contract, to take a transfer of the corresponding shares from his vendor, or to indemnify him from the amount of calls subsequently made. As to the difference between scrip and shares, see, also, Mitchell v. Newark.[6] In Bell v. Lord Mexborough,[7] a demurrer, for want of equity, was allowed by the Vice-Chancellor. As to the specific performance of an agreement for the sale of railway shares, see Duncuft v. Albrecht.[8]

General discussion of question.[9]

SEC. 872. It will be observed that neither Lord Cottenham nor Lord Langdale confines his observations to any particular class of partnerships, as large partnerships commonly called joint-stock, as distinguished from ordinary partnerships. Lord Cottenham indeed says, "It might be suggested that the supposed rule that the court will not direct an account of partnership dealings and transactions, except as consequent upon a dissolution, though true in some cases and to a

[1] See, also, Parsons v. Spooner, 16 Jur. 423.
[2] 10 Jur. 851.
[3] Id. 606.
[4] Id. 626.
[5] 4 Beav. 59.
[6] Exch. 10 Jur. 318.
[7] 10 Jur. 893.
[8] 13 Sim. 189.

certain extent, has been supposed to be more generally applicable than it is upon authority, or ought to be upon principle."[1] His Lordship does not say that the rule is "true in a certain class of cases," as for instance ordinary partnerships consisting of a few members, but only that it is "true in some cases." And Lord Langdale expressly says, "that it now appears very clear that there is no such rule,"[2] and "that the court will entertain a bill to settle a question that may arise between partners, without proceeding to wind up the affairs of the partnership."[3]

"But in all cases of this sort, where an injunction is sought to restrain improper acts by a partner, a very serious question may arise whether the court will interfere, unless the bill not only asks for an injunction, but also for a dissolution of the partnership. Indeed it has been a matter of no small diversity of judical opinion, how far a court of equity ought to interfere in such cases, unless for the purpose of dissolving the partnership and winding up the whole concern, since it may involve the court in perpetual controversies to enforce the observance of the articles, as often as during the long continuance of the partnership, any specific breach may occur, which is a species of jurisdiction which courts of equity are not at all disposed to entertain."[4]

In respect to such duties and obligations of partners, as are of a positive and personal nature, it seems difficult to perceive how courts of equity can enforce a specific performance of them, and therefore, in case of a breach thereof, the injured party must be left to his remedy, if any, at law. But the same objection does not seem to apply to cases where the relief sought is to enforce the due observance of negative duties and obligations, for here all that is required is, that the court should restrain the partner from violating them, or, in other words, from doing acts which violate the express or implied obligation which he is under to forbear. Thus, for example, although a court of equity could not compel a partner to bestow his skill and diligence, and services, faithfully in the partnership business, yet it may interpose by injunction to restrain him from wasting the partnership property, from misusing the partnership name, from interfering to stop the partnership business, or from fraudulent practices injurious and ruinous to the partnership, in violation of his express duties or express contracts.

[1] 4 Myl. & Cr. 689.
[2] 7 Beav. 338.
[3] Id. 307.
[4] Story on Part. 334, and see chap. 11 of that work; 1 Story on Eq. Jur. § 671.

Courts of equity in interfering by way of injunction in cases of partnership, act upon a sound discretion, and will not interfere to remedy any breaches of duty, unless they are of such a nature as may produce permanent injury to the partnership, or involve it in serious perils or mischiefs in future. The courts will not interfere in cases of frivolous vexation, or for mere differences of temper, casual disputes, or other minor grievances between the parties.

On the other hand, where one partner has improperly involved the partnership in debt, or has become himself insolvent, or has otherwise grossly misconducted himself, courts of equity will interpose and restrain him from drawing, accepting or indorsing bills or notes in the name of the firm, or from contracting or receiving partnership debts. So, an injunction will be granted against a partner, who wantonly and grossly obstructs, injures, or prevents the carrying on of the partnership business, or who designedly misapplies the partnership property to purposes not warranted by the articles, or the objects of the trade. If, therefore, a partnership negotiable security is misapplied to the payment of the separate debts of one partner, an injunction will be granted to restrain its farther negotiation, and to require it to be restored to the partnership, or canceled, as the case may require, unless, indeed, it has passed into the hands of a *bona fide* holder, without notice of the misapplication.

Courts of equity will, in some instances, interpose, and appoint a receiver of the joint effects, during the continuance of the partnership. But to authorize a partner to call for a receiver of the stock of a subsisting partnership, he must be prepared to show a case of the grossest abuse and the strongest misconduct on the part of the managing partner; for, except under such circumstances, the court will not interfere, inasmuch as the probable result of its interposition will be the destruction of the trade. Nor will a receiver be appointed upon a summary application, where there is a covenant to refer, and no attempt has been made to submit the matter in dispute to arbitration. But if in the ordinary course of the trade any of the partners seek to exclude another from taking that part in the concern which he is entitled to take, the court will grant a receiver; because such conduct will warrant a dissolution. The principle upon which the Court of Chancery interferes between partners, by appointing a receiver, is merely with a view to the proper relief, by winding up and disposing of the concern, and dividing the produce, and not for the purpose of carrying on the partnership.

Relief, also, will be granted where the partnership has been entered by one partner, under circumstances of gross fraud or gross misrepresentation by the others; for in such cases courts of equity will not only decree the same to be void, but will interpose and restore the injured party to his original rights and property, as far as is practicable. Story on Part. 327–333, 341; 3 Kent's Com. p. 60, 4th ed.; 2 Story's Eq. Juris., § 722.

In accordance with this position his Lordship appears to have directed an account in the case of Hills v. Nash, which has been briefly noticed before, but which must now be stated somewhat more at length. In this case the bill alleged that it was agreed between George Wedd, Thomas Nash, William Carpenter, John Sheppard, Hills & Co., and the plaintiffs in the suit, all being separately engaged in business as corn merchants and corn factors in London and elsewhere, that they should engage in a joint speculation in the purchase and sale of English wheat; and that the purchases and sales should be made principally by the plaintiffs, and partly by the said William Carpenter on the joint account. That the respective parties were to be interested in the adventure according to the proportions in which they held foreign wheat at the time of the agreement. That in pursuance of the agreement the plaintiffs, from time to time, purchased, out of their own funds, large quantities of English wheat on the joint account; and Carpenter also purchased some small quantities of English wheat, in pursuance of the agreement, out of his own funds, upon the joint account; and all the English wheat so purchased was afterward resold, and all such purchases and sales were made within one year from the making of the agreement; and the plaintiffs and Carpenter respectively received the produce of the sales made by them. The speculation was wound up, and all the expenses attending the said purchases and sales were paid by the plaintiffs; and, upon taking the accounts of all the moneys received and paid on account of the said purchases and sales, it appeared that a loss was incurred, amounting to 18,180*l.* 18*s.* 6*d.* The bill further alleged that Carpenter, Wedd and Sheppard had come to an account with the plaintiffs in respect of their several shares of the loss; and that the plaintiffs had then no claim against them, nor had they, the said Carpenter, Wedd, and Sheppard, or any of them, any claim against the estate of the said Thomas Nash, in respect of their shares of the joint purchases and sales; and that nothing whatever was due to the estate of the said J. Nash from Carpenter, Wedd and Sheppard, or

any of them, in respect of Nash's share of the purchases and sales. That Nash never paid any sum whatever on account of the purchases, or in any manner in respect of the speculation; and at his death there was due from his estate to the plaintiffs the sum of 1,010*l.* 1*s.*, with interest thereon from the 25th March, 1841, in respect of his share of the loss incurred as aforesaid. In March, 1841, Nash died, having appointed the defendants his executors, and, in the month of August following, the plaintiffs delivered in their claim against his estate to the defendants, and requested payment, which was refused. In May, 1842, the plaintiffs filed their bill against the defendants, praying an account of all sums received and paid by the plaintiffs on account of the purchases and re-sales of English wheat on the joint account of Carpenter, Wedd, Nash, Sheppard, and the plaintiffs respectively, and of what was due to the plaintiffs in respect thereof from the estate of Nash, the plaintiffs being ready to account for and pay the defendants what, if any thing, was due from them; and that the defendants might be decreed to pay, out of Nash's assets, what should be found due to the plaintiffs from his estate. The defendants, by their answer, stated that the plaintiffs had never given them any satisfactory evidence, and, therefore, they did not believe that Nash had such share or interest as in the bill alleged in the said alleged purchases and re-sales; and they insisted, in the event of the alleged agreement being established, that Wedd, Carpenter and Sheppard were necessary parties to the suit. The plaintiffs amended their bill by making Carpenter a party, alleging that he had taken, and bought for his own use, part of the English wheat bought on the joint account by the plaintiffs and Carpenter, for themselves and Nash, Wedd, and Sheppard, and praying that inquiries might be directed accordingly. Carpenter admitted having taken and bought wheat purchased by him on account of the speculation, but alleged that he had duly accounted for it, and long since settled with the plaintiffs all accounts relative to the subject of the suit, and fully satisfied all claims on him in respect thereof. Evidence was gone into, from which it appeared that the plaintiffs' claim against Carpenter had been settled under an award, and that they had released Wedd and Sheppard, who were examined as witnesses on the part of the plaintiffs. In July, 1843, the cause was heard before the Master of the Rolls, who overruled the objection for want of parties, declared the estate of Nash to be liable for one-eighteenth part of the loss sustained in the adventure, and directed an account accordingly.

From this decision an appeal was brought by the representatives of Nash, and Lord Lyndhurst decided that the objection for want of parties ought to have been allowed. His Lordship said: "If the plaintiffs had agreed severally with each of the defendants to engage with them in a speculation of this sort, and that each should be interested in the profit and loss in a certain proportion, a bill might have been filed against only one of them to obtain payment of his proportion of the loss, without making any other contractors parties, for this would have constituted many separate contracts. But, in the present case, all the parties mutually contracted with each other to engage in this speculation, and to share the profit or loss. It was a mere case of partnership in a particular transaction, or a series of transactions, in which the business was to be transacted and the capital advanced by two of the partners. According to the general rule, therefore, the bill being filed for an account of the partnership transactions by one of the partners against some of the other partners, all the rest ought to have been joined as parties to the suit. Is there any thing, then, in this case to take it out of the general rule? The circumstances insisted upon are these: that Sheppard has paid what is stated to be his share of the loss, and has obtained a release from the plaintiffs; that Wedd is wholly unable to pay, and has been excused by the plaintiffs; and that the case between Carpenter and the plaintiffs was referred to arbitration, and the sum awarded has been paid to the plaintiffs. But none of these transactions are binding upon Nash or his representatives, or can in any way affect their rights. It does not appear to me that they take the case out of the ordinary rule. If a decree should be obtained upon this record it will not have any force against those who are not parties to the record. It would not be binding upon them if any dispute should arise between the parties or any of them and Nash's executors as to the proportion of their contributions or of their obligation to contribute to the loss, or respecting any other matter arising out of this transaction. I think, therefore, the objection for want of parties ought in this case to have been allowed. This is the conclusion to which I have come, though it is not without doubt and hesitation that I have differed from the Master of the Rolls upon a point of this nature."[1]

We are not aware of any case precisely in point having been decided by Lord Cottenham, but from the *dicta* which have fallen from his Lordship, it seems not improbable that had the appeal in this

[1] Hills v. Nash, 10 Jur. 148.

case of Hills v. Nash come before him the decision of Lord Langdale would have been confirmed. Till, however, there shall be a subsequent decision of equal authority, but to a different effect, it is apprehended that for the present the rule must be considered still to be that in ordinary partnerships, all the partners must be made parties to a suit seeking an account, without having regard to the question of dissolution at all, that is, either with or without dissolution.

Demurrer.

SEC. 873. The causes of demurrer being upon matter in the bill which ought not to be therein, or upon the omission of matter which ought to be therein or attendant thereon,[1] either the omission of parties who ought to be parties, or the insertion of parties who ought not to be parties to the suit, will be a cause of demurrer.

It may be observed that in most of the cases cited, the defense to the bill has been by demurrer for want of parties. In regard to the allegation in the bill that the parties are too numerous to be individually named,[2] it is to be observed that since the Joint-Stock Companies Registration Act,[3] the allegation of ignorance of the names of the shareholders will be rejected,[4] and it seems now sufficient to allege that the number of shareholders is so great that it would not be possible, without the greatest inconvenience, to make them parties to the suit, and so to do would render it impossible to bring the suit to a hearing.[5] So, if persons are made co-plaintiffs who have no interest in the subject-matter of the suit, the defendants may demur.[6]

In some of the cases cited above the defendants have also demurred for want of equity and multifariousness.[7]

In reference to the next division it may be observed that in many cases what is a good defense by way of plea is also good as a demurrer, if the facts appear sufficiently by the bill.[8]

Plea.

SEC. 874. If the defect as to parties do not appear on the face of the bill, that may be the subject of a plea.[9] So, if a person having an interest joins with him as a co-plaintiff a party having no interest, the bill is demurrable, if that fact appears on the bill; if the fact

---

[1] Mitf. Pl. 108, 4th ed.
[2] See Mitf. Pl. 170, n. *a*, 4th ed.
[3] 7 & 8 Vict., c. 110, App. p. 89.
[4] Per Knight Bruce, V.C., in Winslow v. Stanhope, 10 Jur. 421.
[5] Id.
[6] The King of Spain v. Machado, 3 Russ. 225; Cuff v. Platell, 4 id. 242.
[7] Wallworth v. Holt, 4 Myl. & Cr. 619; Wilson v. Stanhope, 10 Jur. 421.
[8] Mitf. Pl. 216.
[9] Per Lord Eldon in Cockburn v. Thompson, 16 Ves. 325.

does not appear on the bill, but is brought forward by plea, such a plea is a good defense to the suit.

To a bill for an account the defendant may put in the negative plea of no partnership in bar to the discovery and relief prayed.[1] But a plea which negatives the plaintiff's title, though it protects a defendant generally from answer and discovery as to such matters as are specially charged as evidence of the plaintiff's title, therefore, where circumstances are specially charged as evidence of the partnership, the plea must be accompanied by an answer and discovery as to the matters so charged.[2] Where a partnership is denied the court will sometimes direct an issue at law.

A plea of a stated account is a good bar to a bill for an account. It must show that the account was in writing, or at least it must set forth the balance.[4] There is no absolute necessity that the account should be signed by the parties, as the person to whom it is sent keeping it by him any length of time without making any objection, will make it a stated account.[5] If the plaintiff allege that he has no counterpart of the stated account, the defendant must annex a copy thereof to his plea.[6] If error or fraud is charged, it must be denied by the plea as well as by way of answer;[7] and if neither the error nor fraud

[1] Per Sir John Leach in Makepeace v. Haythorne, 4 Russ. 244, where the defendant pleaded in bar that one of the two co-plaintiffs was an uncertified bankrupt, and the plea was allowed.

[2] Drew v. Drew, 2 Ves. & B. 159; —— v. Harrison, 4 Madd. 252, in which case the defendants by their answer denied the partnership and refused to set forth any account. Exceptions were taken to the answer for insufficiency in not having set forth the accounts. The Vice-Chancellor said: "That point is settled. If a defendant answers he must answer fully. They should have pleaded;" and see Mitf. Pl, 230, 231, n. *k*.

[3] Saunders v. King, Madd. & G. 61, (S. C.), cited by Sir John Leach from a MS. note of his judgment in Thring v. Edgar, 3 Sim. & Stu. 274; Yorke v. Fry, Madd. & G. 65. See Lord Cottenham's observations on Thring v. Edgar, in the case of Denys v. Locock, 3 Myl. & Cr. 205. In this case where it was held that a negative plea, which professes to be a plea to the whole bill, except certain specified parts, but yet proceeds to traverse some of the parts so excepted, is bad, Lord Cottenham said: "A negative plea is a mere traverse; it differs from an ordinary plea, inasmuch as the ordinary plea admits the truth of the bill, but states some matter *dehors*, which destroys the effect of the allegation, and which, assuming the allegation to be true, would be a defense." 3 Myl. & Cr. 234.

[4] Mitf. Pl. 259.

[5] Per Lord Hardwicke, Willis v. Jernegam, 2 Atk. 251. In Tickel v. Short, 2 Ves. Sen. 239, Lord Hardwicke said: "If one merchant sends an account current to another in a different country, on which a balance is made due to himself, and the other keeps it by about two years without objection, the rule of this court and of merchants is, that it is considered as a stated account." But in Irvine v. Young, 1 Sim. & Stu. 333, Sir John Leach held that the mere fact of the delivery of an account, without evidence of acquiescence, does not afford sufficient legal presumption that the account was settled.

[6] Hankey v. Simpson, 3 Atk. 303; and see Mitf. Pl. 260, n. *h*.

[7] Mitf. Pl. 260; 6 Ves. 596. Though to a bill preferred generally for an account, an account stated is a good plea; yet if the bill set forth that there was an account, and that there was a mistake, and set forth the particular mis-

is charged, the defendant must by the plea aver that the stated account is just and true to the best of his knowledge and belief.[1] The delivery up of vouchers at the time the account was stated seems to be a proper averment in a plea of this nature, if the fact was such.[2]

If there be any promise or agreement to rectify mistakes, an account stated and a receipt in full of all demands for the balance will not constitute a plea in bar to a bill seeking to open the accounts, there being mistakes in them.[3] On the ground of fraud a stated account has been opened after the lapse of twenty-three years, the person guilty of the fraud being dead likewise.[4] But, generally speaking, the court is averse to unraveling an old account, though settled upon an erroneous principle.[5] In one case, the Master of the Rolls held that the account should stand as a stated account, with liberty to the representatives of any of the partners to surcharge and falsify.[6] And, where specific errors were alleged and proved, the court refused, after an acquiescence of eleven years, to open the account entirely, but only allowed the plaintiff to surcharge and falsify.[7] The expression "errors excepted" will not prevent an account from being a settled account, that being always implied in the settlement of an account.[8]

A release pleaded to a bill for an account must be under seal, but it need not be signed; a release not under seal must be pleaded as a stated account only.[9] An award may also be pleaded to a bill to set aside the award and open the account, and it is not only good to the merits of the case, but, likewise, to the discovery sought by the bill.[10] But, if fraud or partiality is charged against the arbitrators, or any other equitable objection to the award is charged in the bill, those

take, there an account stated is no good plea, as it would leave the particular mistake unanswered. Anon., 2 Freem. 62; see also Clarke v. Earl of Ormonde, Jac. 116. See Lord Eldon's observations on the necessity of denying by plea and answer in Bayley v. Adams, 6 Ves. 596.

[1] Mitf. Pl. 260.

[2] Id.

[3] Proud v. Combes, 2 Freem. 183; Chandler v. Dorset, Rep. *temp.* Finch, 431; Walker v. Consett, Forrest's Exch. R. 157; Robert's v. Kuffin, 2 Atk. 112; and see Mitf. Pl. 259, n. *e*. A party seeking to open an account must point out specific errors by his bill, otherwise he will not be permitted to prove them at the hearing. Taylor v. Hayling, 1 Cox, 435; 2 Bro. C. C. 310; Dawson v. Dawson, 1 Atk. 1

[4] Vernon v. Vawdry, 2 Atk. 119; see, also, Wharton v. May, 5 Ves. 27; Beaumont v. Boultbee, id. 485; and Mitf. Pl. 259, n. *f*.

[5] Gray v. Minnethorpe, 3 Ves. 103; Chambers v. Goldwin, 5 id. 837.

[6] Morris v. Harrison, Colles' P. C. 157. For the purpose of surcharging and falsifying accounts, some specific error must be charged. Chambers v. Golding, 9 Ves. 266; Kinsman v. Barker, 14 id. 579.

[7] Brownell v. Brownell, 2 Bro. C. C. 62.

[8] Johnson v. Curtis, 3 Bro. C. C. 266; and n. 1.

[9] Mitf. Pl. 263.

[10] Mitf. Pl. 260.

charges must not only be denied by way of averment in the plea, but the plea must be supported by an answer showing the arbitration to have been incorrupt and impartial.[1] Similarly, if fraud, surprise, or any other equitable objection to a release, be charged in a bill seeking to set it aside, the plea must deny those charges by averments, and must also specifically negative them by answer.[2]

The statute of limitations[3] is likewise a good plea in bar to a bill for an account,[4] the exception in the statute as to merchants' accounts,[5] having been held to apply only to accounts open or current, and not to cases where the account is closed and concluded between the parties.[6] The plea of the statute of limitations will also apply to the case of a suit against the representatives of a deceased partner for an account, but, if the deceased partner has devised his estate for payment of his debts, the statute of limitations cannot be pleaded in bar of demands which had legal existence at the time of his death.[7]

In regard to a plea of the arbitration clause of the articles of partnership to a bill by one partner against his copartner for discovery and relief, Lord Redesdale has the following observations in his Treatise on Pleadings in Chancery: "To a bill by one partner in trade against his copartner for discovery and relief relative to the partnership transactions, a plea of the articles of partnership, by which it was agreed that all the differences which might arise between the partners should be referred to arbitration, and that no suit should be instituted in law or equity until an offer should have been made to leave the matter in difference to abitration, and that offer had been refused, has been allowed.[8] This case has been much questioned, and it now seems to be determined that such an agreement cannot be pleaded in bar of a suit.[9] Nor will the court compel a specific performance of the agreement.[10] Indeed, it seems impossible to maintain that such a

[1] Id.

[2] Beams' Pleas in Equity, 219. As to the practice of the court in regard to pleas upon awards, releases, etc., see Lord Eldon's observations in Bayley v. Adams, 6 Ves. 595, 596, 597.

[3] 21 Jac. I., c. 16.

[4] Welford v. Liddel, 2 Ves. Sen. 400; Barber v. Barber, 18 Ves. 286.

[5] 21 Jac. I., c. 16, s. 3.

[6] Welford v. Liddle, 2 Ves. Sen. 400. Mr. Gow. (Partn. 103, 3d ed.) quotes the following note from Harcourt MS. Tables: "Currency of accounts prevents the statute of limitations. Ormston v. Hamilton, 20th March, 1711." See, also, Robinson v. Field, 5 Sim. 14; and Beames' Pleas in Eq. 167.

[7] Ault v. Goodrich, 4 Russ. 434.

[8] Halfhide v. Fenning, 2 Bro. C. C. 336. *Contra*, Wellington v. Mackintosh, 2 Atk. 569.

[9] Satterly v. Robinson, Exch. 17 Dec. 1791; Mitchell v. Harris, 3 Bro. C. C. 311; S. C., 2 Ves. Jun. 129; Street v. Rigby, 6 Ves. 815, 14 id. 270; Waters v. Taylor, 15 id. 10.

[10] 6 Ves. 818; Milnes v. Gery, 14 id. 400.

contract should be specifically performed, or bar a suit, unless the parties had first agreed upon the previous question, what were the matters in difference, and upon the powers to be given to arbitrators, amongst which the same means of obtaining discovery upon oath, and production of books and papers, as can be given by a court of equity, might be essential to justice. The nomination of arbitrators, also, must be a subject on which the parties must previously agree, for, if either party objected to the person nominated by the other, it would be unjust to compel him to submit to the decision of the person so objected to as a judge chosen by himself. It must also be determined that all the subjects of difference, whether ascertained or not, must be fit subjects for the determination of arbitrators, which, if any of them involved important matter at law, they might not be deemed to be."[1]

Answer.

SEC. 875. If the defendant mean to deny the partnership and refuse to set forth any account (though formerly he may have done so by answer),[2] he must do so by plea, for, if he answers, he must answer fully,[3] except that he may refuse to answer as to what may subject him to a penalty.[4]

On a motion by the defendant to a bill for a partnership account, for a production of the accounts before answer, Lord Eldon said: "I do not recollect a single instance of such a motion granted, but the object may be obtained in another way. * * * I think I remember this kind of motion by the defendant, stating by his answer that the bill calls for a discovery which he cannot make completely without seeing the partnership books and accounts, and he verily believes those books and accounts, to the joint possession of which both were entitled, are in the hands of the plaintiff, that the court would stay proceedings against him for not putting in his answer, until he has been assisted with that inspection. That sort of motion will do without a cross-bill, but this motion must be refused."[5]

Where the defendants are numerous, each, it seems, is entitled to put in a separate answer, although they should have but one common defense.[6]

---

[1] Mitf. Pl. 264, 265; and see *ante*, Part 1, Ch. VII, pl. 4; Ch. VIII, pl. 17.

[2] See Mitf. Pl. 312, and the cases there cited.

[3] ——— v. Harrison, 4 Madd. 253; Somerville v. Mackay, 16 Ves. 382.

[4] Nelme v. Newton, 4 Madd. 253, note; Curzon v. De la Zouch, 1 Swanst. 192; Ewing v. Osbaldiston, 6 Sim. 608.

[5] Pickering v. Rigby, 18 Ves. 484.

[6] Van Sandau v. Moore, 1 Russ. 441; Bisset on Partn. 306-855; Mitf. Pl. 306, n. *d*.

Injunctions against directors, etc.

SEC. 876. With respect to injunctions against companies and their directors, little remains to be added. In order, however, to facilitate reference, it will be convenient to collect those cases in which an injunction has been granted or refused, although they may have been noticed in previous pages.

In relying upon the authorities here collected, it is to be borne in mind that, before the hearing of a cause, a court of equity will not restrain the exercise of a clear legal right, unless it is satisfied that it will be compelled to do so at the hearing;[1] nor will it interfere if it is not in possession of all the material facts, and convinced that an immediate injunction is imperatively required.[2]

1. An injunction has been granted to restrain the improper insertion or continuance of a person's name on the register of shareholders;[3] the registry of an improper transfer of shares;[4] the improper making of calls;[5] the illegal forfeiture of shares;[6] the unfair use by a company of a creditor's name in an action against a shareholder;[7] the illegal suspension of a shareholder from his rights;[8] the illegal payment of dividends;[9] the making of loans to directors;[10] the departure of a company from the prosecution of the objects to attain which it was formed; viz., to restrain a fire and life insurance company from engaging in marine insurances;[11] a railway company from guaranteeing the payment of dividends by a steam packet company;[12] so from taking an unauthorized number of shares in another railway company;[13] so from making a different railway from that which it was incorporated to make;[14] or part only of such railway;[15] or one only out of several railways which it has been formed to make:[16] the

[1] Playfair v. Birmingham, etc., Rail. Co., 1 Ra. Ca. 640.

[2] Fielding v. Lancashire, etc., Rail. Co., 2 De G. & S. 531.

[3] Taylor v. Hughes, 2 Jo. & Lat. 24; Shortridge v. Bosanquet, 16 Beav. 84; compare Bullock v. Chapman, 2 De G. & S. 211.

[4] Fife v. Swaby, 16 Jur. 49.

[5] Preston v. Grand Collier Dock Co., 11 Sim. 327; compare Bailey v. Birkenhead, etc., Rail. Co., 12 Beav. 433.

[6] Watson v. Eales, 22 Beav. 294; Norman v. Mitchell, 5 De G. Mac. & G. 648; Naylor v. South Devon Rail. Co., 1 De G. & Sm. 32.

[7] Taylor v. Hughes, 2 Jo. & Lat. 24.

[8] Adley v. Whitstable Co., 17 Ves. 315; 19 id. 304, 1 Mer. 107.

[9] Carlisle v. South Eastern Rail. Co., 1 Mac. & G. 689; Henry v. Great Northern Rail. Co., 4 K. & J. 1, and 1 De G. & J. 606.

[10] Blue v. Melalue, 5 Jur. 1018.

[11] Natusch v. Irving.

[12] Colman v. Eastern Counties Rail. Co. 10 Beav. 1.

[13] Salomons v. Laing, 12 Beav. 377.

[14] Bagshaw v. Eastern Union Rail Co., 7 Ha. 114, and 2 Mac. & G. 389; Simpson v. Denison, 10 Ha. 51.

[15] Cohen v. Wilkinson, 12 Beav. 125, and 1 Mac. & G. 481; Logan v. Courtown, 13 Beav. 22.

[16] Hodgson v. Powis, 12 Beav. 392 and 529, and 1 De G. Mac. & G. 6.

transfer, by one company, of its business to another company ;[1] the amalgamation of two companies having similar objects;[2] a company and its directors from applying to Parliament at the expense of the company, for power to do what it was not formed to do;[3] a chartered company from surrendering its charter ;[4] the publication of the contents of books and documents inspected under an order.[5]

An injunction has been refused to restrain—

SEC. 877. The non-registry of a transfer of shares;[6] the making of calls by a company commencing business with less capital than that originally contemplated;[7] the making of necessary calls by directors who had been guilty of improper conduct;[8] the making of calls on some only of the members of an amalgamated society;[9] the making of calls on all the members of two amalgamated companies to pay the debts of one of such companies ;[10] actions for calls on improperly relinquished or forfeited shares ;[11] the borrowing of money by a limited company ;[12] the issuing of preference shares;[13] the application of the money raised by the issue of preference shares to a purpose different from that for which it was raised ;[14] the return of deposits to subscribers ;[15] the payment of dividends before payment of debts;[16] the payment of dividends before the completion of the company's works;[17] the continuance in office of directors appointed in the place of others removed;[18] the management of a company's affairs by directors whose conduct was complained of, no sufficient attempt having been made to control them before applying to the court;[19] the sailing of a ship

[1] Charlton v. Newcastle and Carlisle Rail. Co., 5 Jur. (N. S.) 1096; Beman v. Rufford, 1 Sim. (N. S.) 550; Winch v. Birkenhead, etc., Rail. Co., 5 De G. & S. 562 ; see, too, Salomons v. Laing, 12 Beav. 377.

[2] Gilbert v. Cooper, 10 Jur. 580, V. C. E.

[3] Munt. v. Shrewsbury and Chester Rail. Co., 13 Beav. 1 ; Simpson v. Denison, 10 Ha. 51; Vance v. East Lanc. Rail. Co., 3 K. & J. 50.

[4] Ward v. Society of Attorneys, 1 Coll. 370.

[5] See Williams v. Prince of Wales Co., 23 Beav. 338.

[6] Taft v. Harrison, 10 Ha. 489.

[7] Norman v. Mitchell, 19 Beav. 278, and 5 De G. Mac. & G. 648.

[8] Logan v. Courtown, 13 Beav. 22.

[9] Bailey v. Birkenhead, etc., Rail. Co., 12 Beav. 433; compare Preston v. Grand Collier Dock Co., 11 Sim. 327.

[10] Cooper v. Shropshire Union Rail. Co., 6 Ra. Ca. 136; S. C., 13 Jur. 443; see No. 14 *infra*.

[11] Harris v. North Devon Rail. Co., 20 Beav. 384; Playfair v. Bristol, etc., Rail. Co., 1 Ra. Ca. 640.

[12] Bryon v. Metropolitan Saloon Om. Co., 4 Jur. (N. S.) 680, and on appeal, 3 De G. & J. 123 ; see No. 14.

[13] Edwards v. Shrewsbury, etc., Rail. Co., 2 De G. & Sm. 537 ; see No. 14.

[14] Yetts v. Norfolk Rail. Co., 3 De G. & Sm. 293.

[15] Kent v. Jackson, 14 Beav. 367, and 2 De G. Mac. & G. 49.

[16] Stevens v. South Devon Rail. Co., 9 Ha. 326. See No. 14.

[17] Brown v. Monmouthshire, etc., Rail. Co., 13 Beav. 33. See No. 14.

[18] Inderwick v. Snell, 2 Mac. & G. 216.

[19] Carlen v. Drury, 1 V. & B. 142; Waters v. Taylor, 15 Ves. 10 ; Foss v. Harbottle, 2 Ha. 461; Moxley v. Alston, 1 Ph. 790.

on a voyage disapproved of;[1] the assignment of a company's property to trustees upon trust to sell and pay the company's debts;[2] the total abandonment by a railway company of its works, it not having funds to complete them;[3] the application to Parliament, otherwise than at the expense of the company, for power to enable the company to do what it was never intended it should do;[4] a railway company empowered to purchase a canal, from exercising the powers of a canal company.[5]

With reference to injunctions against companies, it may be observed that if an injunction is sought only by a nominee of a rival company, for the benefit of that company, it is at least doubtful whether the court will interfere.[6]

Actions at law by and against companies.

SEC. 878. The rights and obligations of companies as between themselves and non-members are determined by the principles examined in the preceding chapters of the present book. What contracts are to be regarded as contracts of a company, what frauds and torts are imputable to it, and what to its directors or agents individually, are questions which have already been answered. In the present section it is proposed to advert to the mode in which companies can sue and be sued at law.[7]

With reference to this question, companies may be divided into two classes, incorporated and unincorporated. An incorporated company, whether it is incorporated by charter, special act of Parliament, or registration, can and must sue and be sued by its corporate name.[8] But an unincorporated company, however numerous its members, is fundamentally a partnership, and the rules relating to parties to actions discussed in the preceding pages apply to all unincorporated companies without exception, save where some statutory enactment to the contrary can be shown to exist.[9]

---

[1] Miles v. Thomas, 9 Sim. 606.

[2] Lord v. Governor and Co. of Copper Miners, 2 Ph. 740.

[3] Logan v. Courtown, 13 Beav. 22.

[4] Ware v. Grand. Junc. Waterw. Co., 2 R. & M. 470; see, too, Bill v. Sierra Nevada, etc., Co., 6 Jur. (N. S.) 184, where the court declined to restrain the directors of a company from applying to a foreign state for authority to alter the constitution of the company.

[5] Rogers v. Oxford, etc., Rail. Co., 2 De G. & J. 662.

[6] See the last case; Lindley on Part. pp. 846-849.

[7] See section as to proceedings against individual members.

[8] See Fell v. Burchett, 7 E. & B. 587, where a shareholder in a registered company was unsuccessfully sued. Compare Barton v. Hutchinson, 2 Car. & K. 712. The company should be sued in its corporate name simply. Pilbrow v. Pilbrow's Atmospheric Rail. Co., 3 C. B. 730.

[9] This observation is not intended to apply to proceedings in the Stannary courts.

Although the necessary consequences of this is to throw considerable difficulties in the way of unincorporated companies when they have to sue at law on contracts entered into with them, it does not practically offer much obstruction to a creditor who seeks to obtain payment of a debt owing by the company. For although it is very true that if he does not sue all the shareholders who in strictness ought to be sued, he may be met by a plea in abatement, yet, inasmuch as such a plea is of no avail unless it discloses the names of all the persons who ought to be made defendants, and unless it is verified by affidavit, and unless it is strictly proved if issue is taken upon it, is practically impossible for a member of a large company seriously to obstruct or embarrass a creditor by having recourse to a plea in abatement, founded on the non-joinder of the other shareholders.[1] A creditor, therefore, may with comparative safety take his chance of a plea in abatement, and sue any shareholder he likes. But he may do more, for if he brings twenty different actions against twenty different shareholders for the recovery of the same demand, the court will not interfere and stay all actions except one,[2] although after the creditor has been paid his debt and the costs of one action, the other actions will be stayed without payment of any costs.[3]

When an unincorporated company takes legal proceedings to enforce its rights, it has to encounter many formidable obstacles arising from the rules relating to parties to actions before explained. The natural consequence has been that various devices are had recourse to, in order to evade the rules in question. Most of these, however ingenious, are utterly worthless. Attempts to enable actions to be brought by the chairman for the time being of the directors of a company,[4] or by the directors for the time being of a company,[5] or by the purser for the time being of a cost-book company,[6] have all been made in turn, and have all been made in vain.[7]

A contract entered into with the chairman of directors for the time being, or the directors for the time being, or the purser for the time being is, in point of law, a contract with the chairman, the directors, or the purser, at the time the contract is entered into, and must be

[1] Crellin v Calvert, and Crellin v. Brooke, 14 M. & W. 11, may be referred to as illustrating the above observation.

[2] Giles v. Tooth, 3 C. B. 675; Newton v. Belcher, 9 Q. B. 612.

[3] Newton v. Blunt, 3 C. B. 675; Carne v. Legh, 6 B. & C. 124; Nesbitt v. Howe, 8 Ir. Law Rep. 273; see as to costs, Henry v. Nash, 1 Ex. 826.

[4] Hall v. Bainbridge, 1 Man. & Gr. 42.

[5] See Phelps v. Lyle, 10 A. & E. 113; Woolmer v. Tobey, 4 Ra. Ca. 713, as to who ought to sue on contracts with "directors."

[6] Hybart v. Parker, 4 C. B. (N. S.) 209.

[7] See as to all such attempts, Radenhurst v. Bates, 3 Bing. 470.

sued upon accordingly. Moreover, if the contract is in writing, but not under seal, and it has been expressly entered into on behalf of the company so as to be the contract of the company, the company, *i. e.*, all the shareholders in it, will, as before explained, be the proper parties to sue upon it, and an action in the name of less than all will fail. Generally, therefore, it may be said, that where the rules of the common law have not been modified by statute, unincorporated companies must sue and be sued just as if they were ordinary partnerships.[1]

Turning now to the statute book it will be found that there are only two kinds of unincorporated companies to which the ordinary rules are rendered inapplicable by general enactments. These are banking companies governed by the 7 Geo. IV, c. 46, and companies formed under the Letters Patent Act, 7 Wm. IV, & 1 Vict., c. 73.[2] Each of these kinds of companies is empowered to sue and be sued in the name of an individual appointed to sue and be sued on its behalf; and proceedings taken by or against him may be continued, without abatement, by or against his successor in office. But although these are the only general enactments bearing upon the present question, there is a large number of private acts[3] applicable to particular companies, and substantially to the same effect as those which have been mentioned. It is customary to designate such companies as companies empowered to sue and be sued,[4] and amongst them will be found most existing unincorporated companies formed for other than mining purpose before the passing of the Joint-Stock Companies Registration Act of 1844.

With respect to these companies, the first observation to be made is that it does not follow that, because they may sue and be sued by a public officer, therefore a creditor may not sue any one or more of the shareholders, if he chooses so to do, and to run the risk of a plea in abatement. Creditors are not to be deprived of their common law rights by an act of Parliament which is consistent with their retention of those rights.

---

[1] A contract made with an agent of a company may be sued on by the agent, unless the contract is on the face of it made with the company through its agent. See Clay v. Southern, 7 Ex. 717.

[2] Industrial and Provident Societies are empowered to sue and be sued by a public officer by 17 & 18 Vict., c. 25. These societies do not fall within the scope of the present treatise. See as to their public officers, Burton v. Tannahill, 5 E. & B. 797.

[3] There are also some colonial statutes to the same effect. The validity of one of them was unsuccessfully disputed in Bank of Australasia v. Nias, 16 Q. B. 717. See, too, Bank of Australasia v. Harding, 9 C. B. 661, and Kelsall v. Marshall, 1 C. B. (N. S.) 241.

[4] A good account of the progress of legislation relating to these companies will be found in Van Sandau v. Moore, 1 Russ. 441.

In Blewitt v. Gordon,[1] an action was brought against a member of a company on a bill of exchange and the common counts. The company had obtained a special act of Parliament which enacted that actions against the company should and lawfully might be commenced, issued, and prosecuted against the secretary, or any one of the elected directors of the company. The defendant was not the secretary or a director of a company, and he put in a plea to that effect; but the plea was adjudged not issuable; for it appeared from other sections of the act that it was not intended to relieve shareholders from any of the common-law obligations or liabilities of partners; and it was therefore held that, although a creditor might sue the secretary or a director of the company, it was not incumbent on him to do so. Similar decisions have been made in other cases on other acts of Parliament.[2]

Another observation to be made with respect to these private acts is, that the public officers created by them have no powers except those expressly conferred upon them. Where, therefore, a company was empowered to sue and be sued in the name of its secretary, and to institute actions and suits in his name, it was held that he had no power to petition on behalf of the company for a commission of bankruptcy against one of its debtors.[3]

Questions sometimes arise as to whether a public officer can sue or be sued in respect of a contract not expressly entered into with the company. These questions will all be found to turn on the language of the act applicable to the company to which the questions relate; but speaking generally, it may be said that a public officer may sue or be sued upon contracts which are contracts of the company in point of substance, although not perhaps in point of form.

In Soulby v. Smith,[4] the directors of a company had caused some goods to be put up for sale by auction and the plaintiff had purchased them; but not being able to obtain possession of them, he sued the secretary of the company, there being an act of Parliament empowering it to be so sued. The declaration alleged promises by the directors of the company, and a plea was put in denying promises by the company, and it was argued that the directors and not the secre-

[1] 6 Jur. 823, per Coleridge, J.; S. C., 1 Dowl. (N. S.) 815.

[2] Pentland v. Gibson, 1 Alc. & Nap. 310; Beech v. Eyre, 5 Man. & Gr. 415.

[3] Guthrie v. Fisk, 3 B. & C. 178, and see Ex parte Guthrie, 1 Gl. & Jam. 245. Some of the order acts only empower companies to sue by their public officers, and are altogether silent about their being sued. See the act which was in question in Meux v. Maltby, 2 Swanst. 277. Modern acts are much more comprehensive in their terms.

[4] 3 B. & Ad. 929.

tary ought to have been used. But it was held that the contract declared on was in effect the contract of the company, and that the action was proper in point of form.

In Smith v. Goldsworthy, the defendant had entered into a covenant with three persons, who were in fact trustees for a company, but the covenant was not expressed to be made with them in any official capacity. The company's act empowered it to sue by its secretary upon any covenants entered into with the company, or wherein the company was or should be interested; and it was held, that under these circumstances the secretary on behalf of the company had power to sue the defendant upon the covenant into which he had entered. Wills v. Sutherland[1] is a still stronger case, for whilst the covenant there sued on was similar to that in Smith v. Goldsworthy, the act contained no words referring to contracts in which the company might be interested, but merely declared that in all actions by or on behalf of the company, it should be sufficient to state and proceed in the name of its secretary.

A promissory note payable to the order of a person who is in fact a trustee for a company empowered to sue by a public officer, must, if unindorsed, be sued upon by the payee and not by the public officer.[2]

A public officer may sue for a libel on the company represented by him, although it is not a corporate body.[3]

By far the greater number of decisions to be met with in the books relating to public officers have turned upon the Banking Act of 7 Geo. IV, and to these decisions, so far as they relate to actions between companies governed by the act on the one hand and strangers on the other, it is now proposed to direct the reader's attention.

The Banking Act of 7 Geo. IV, c. 46,[4] has been decided to require imperatively, that all actions by or against companies governed by it, shall be brought by or against their public officers and not otherwise. For this act does not, like those in Blewitt v. Gordon and other cases of that class, leave the obligations and liabilities of the partners the same as they would be at common law, but materially modifies them, and effect cannot be given to the various provisions of the act if actions are allowed to be brought by or against the company otherwise than in the manner prescribed by the act itself.[5]

[1] 4 Q. B. 430. Skinner v. Lambert, 4 Man. & Gr. 477, is substantially a similar case.

[2] 4 Ex. 211.

[3] See M'Dowell v. Doyle, 7 Ir. Com. Law Rep. 598.

[4] Williams v. Beaumont, 10 Bing. 260.

[5] Amended by 1 & 2 Vict., c. 96, and 3 & 4 Vict., c. 11.

[6] Steward v. Greaves, 10 M. & W. 711; Chapman v. Milvain, 5 Ex. 61. Compare Robertson v. Sheward, 1 Man. &

Even if there is no public officer, it is doubtful whether any action can be brought against the company until one is appointed, and whether, therefore, a person desirous of suing the company must not, before he can bring an action, compel the company to appoint an officer whereby it may be sued.[1]

The fact that the company has stopped payment does not prevent it from suing and being sued by its public officer,[2] and if a banking company changes its name the public officer of the new company represents the old company.[3] Whatever number of public officers a company may have, one only should sue or be sued.[4] The bankruptcy of a public officer does not prevent his being sued as such.[5]

The change of public officers *pendente lite* does not, whether he is plaintiff or defendant, abate the action. If an action is brought by a public officer, the fact that judgment is entered up in his name after he has been removed from office does not entitle the defendant to set aside the judgment, and the subsequent proceedings upon it, but leave will be given to enter on the roll *nunc pro tunc*, a suggestion of the plaintiff's removal and the appointment of a fresh officer, and to amend the judgment and writ of execution by the insertion of the name of the new officer.[6]

It is to be observed, that if a person who is not a public officer sues as if he were, the company which he assumes to represent is not a party to the action, and consequently will not be affected by the judgment in it; hence the fact, that the plaintiff is what he pretends to be, is material and traversable,[7] and declarations by public officers have been held bad on special demurrer for not stating with sufficient precision the character in which the plaintiff on the record was suing, and the existence of the company he assumed to represent.[8] At the same time, unless the fact that the plaintiff is suing on behalf of a company having a public officer appears on the declaration, or unless

Gr. 211. See as to laying intent to defraud in indictment for forgery, R. v. Carter, 1 Car. & K. 741; R. v. Beard, 8 Car. & P. 143; R. v. James, 7 id. 553; R. v. Burgiss, id. 490; and as to an affidavit to hold to bail, Spencer v. Newton, 6 A. & E. 630. The Industrial Provident Societies Act is also imperative, Burton v. Tannahill, 5 E. & B. 797.

[1] See Steward v. Graeves, 10 M. & W. 711.

[2] Davidson v Cooper, 11 id. 778; Needham v. Law, id. 400.

[3] Wilson v. Craven, 8 id. 584.

[4] Holmes v. Binney, 4 Bing N.C. 454.

[5] Steward v Dunn, 11 M. & W. 63.

[6] See Webb v. Taylor, 8 Jur. 39; Todd v. Wright, 11 id. 471; and as to the proper mode of entering the suggestion on the roll, see Barnewell v. Sutherland, 9 C. B. 380, and Paterson v. Ironside, 14 Jur. 722, note.

[7] See Barnewell v. Sutherland, 9 C. B. 380; Steward v. Dunn, 11 M. & W. 63.

[8] See Esdaile v. Maclean, 15 M. & W. 277; M'Intyre v. Miller, 13 id. 725; Fletcher v. Crosbie, 9 id. 252; Christie v. Peart, 7 id. 491; Spiller v. Johnson, 6 id. 570; Davidson v. Bower, 4 Man. & Gr. 626.

the defendant raises the objection that the plaintiff is so suing, so as to put that fact in issue, it will not be material that the action is brought on behalf of a banking company subject to the statute of 7 Geo. IV, c. 46, by a person not appearing to be its public officer.[1] This was held in a case where an action was brought by the general manager of a bank on a promissory note made payable to its manager, and given to the manager of a local branch; it was objected, 1st, that this last person ought to have sued; or, 2nd, that the public officer of the bank ought to have sued in his representative capacity. Both objections were overruled; the 1st, because the plaintiff was the manager of the bank in the proper sense of the phrase; and the 2nd, because the defendant had only put in issue the fact that the plaintiff was manager, and the objection in question was not, therefore, open to him.[2]

Although, as has been seen, a public officer may sue on behalf of a company which has stopped payment, as otherwise the company could not get in its debts, there can be no public officer under the 7 Geo. IV, c. 46, of a company which has not begun to carry on the business of bankers under that act. Therefore a plea to an action by a public officer denying that the company he represents carried on business as alleged in the declaration, has been allowed to be pleaded with other pleas,[3] and declarations by public officers have been successfully demurred to for not stating that the companies represented by them do or did carry on the business of bankers as contemplated by the act.[4]

In an action against a public officer as a nominal defendant, he may deny that he fills the office he is assumed to fill.[5] But this plea will be of no avail if the only evidence to support it is that the company has ceased to carry on the business.[6] A plea of the bankruptcy of a person sued as a public officer will not be allowed to stand, if the plaintiff will give an undertaking not to issue execution against the person or property of the defendant himself.[7]

Of the recovery back of subscriptions to companies.

SEC. 879. When a company is projected, it is usual to advertise it, to state its proposed capital and the number of shares into which it

[1] Robertson v. Sheward, 1 id. 511.
[2] Id.
[3] Roe v. Fuller, 7 Ex. 220; Steward v. Dunn, 11 M. & W. 63.
[4] Fletcher v. Crosbie, 9 id. 242; and compare Davidson v. Bower, 4 Man. & Gr. 626.
[5] *Qu.* whether the plea of denial must not be supported by affidavit, Wood v. Marston, 7 Dowl. 865.
[6] See Needham v. Law, 11 M. & W. 400; Davidson v. Cooper, id. 778
[7] Steward v. Dunn, 11 M. & W. 63; Wood v. Marston, 7 Dowl. 865. The foregoing from s. 874, is from Lindley on Part. pp. 408–415.

is to be divided, and to offer those shares to the public. When shares are applied for and allotted, the allottee is generally called upon to pay a deposit of so much per share, as a first installment of the total amount which he undertakes to pay by his acceptance of the shares allotted to him. In the present section it is proposed to consider the circumstances under which an allottee of shares, who has paid a deposit upon them, has a right to have this deposit returned, upon the ground that the consideration for its payment has failed.

It has been recently decided by the House of Lords that if a number of persons, meaning to join in a common undertaking, raise a common fund, eventually to be increased, but commencing by a deposit, and they put these deposits for a common object into the hands of a committee, with directions to them to do certain acts, it is not competent for any one or more of the subscribers, against the will of the others, to withdraw and say, "I think, or we think, you ought not to go any further." Any one subscriber who is not of that opinion has a right to say, "I gave my money upon the faith that we were all embarked in one common undertaking, and till that has been done, which we agreed should be done, none have a right to withdraw and say you shall not go any further."[1] It follows from this that no subscriber to a projected company can recover back his money on the ground that the consideration for his subscription has failed, until the formation of the company upon the terms assented to by him[2] has been abandoned or has become impracticable.

But further, when a person applies for shares and has them allotted to him, a contract is entered into between him and others, and before any question as to failure of consideration can be discussed, the terms of this contract must be examined for the purpose of ascertaining precisely for what the deposit was paid.[3] If the contract shows that the deposit was paid for a share in a company to be formed for certain purposes and upon certain conditions, and no such company is formed, and the time for its formation (which, if no time is limited, must be taken to be a reasonable time) has elapsed, then the consid-

[1] Baird v. Ross, 2 Macqueen, 61; see, too, Burnes v. Pennell, 2 Ho. Lo. Ca. 497; compare Kent v. Jackson, 14 Beav. 367, and 2 De G. Mac. & G. 49.

[2] See Johnson v. Goslett, 18 C. B. 728; and 3 C. B. (N. S.) 569.

[3] Hence in an action for the recovery back of the deposit, the letter allotting the shares in respect of which the deposit was paid must be produced, Clarke v. Chaplin, 1 Ex. 26; it does not require a stamp, Vollans v. Fletcher, 1 Ex 20; Willey v. Parratt, 3 id. 211; Mowatt v. Londesborough, 3 E. & B. 807; and other cases cited *infra*. The defendants will, if necessary, be ordered to produce the agreement between them and the plaintiff, Steadman v. Arden, 15 M. & W. 587.

eration for which the deposit was paid has failed, and the deposit is returnable, unless the original contract has been varied with the consent of the subscriber of the deposit. But if the contract shows that the deposit was made for some other purpose (*e. g.*, for the purpose of being employed in attempting to start the company) then the circumstance that the company has not been and cannot be formed is no reason why the deposit should be returned.

In support of the first of these propositions numerous cases may be cited.

In Nockels v. Crosby,[1] the defendants, in circulars published by them, had proposed to receive subscriptions of 10*s.* a week for the space of one year, and to invest these subscriptions and to divide the interest twice a year equally amongst the subscribers or the survivors of them. The plaintiff subscribed to this scheme, but there not being a sufficient number of other subscribers nothing was ever invested, and the defendants came to a resolution to proceed with it no further, and to return to each subscriber the amount of his subscription, less a percentage for expenses incurred. The plaintiff demanded to have the whole amount subscribed by him returned, and he brought an action against the defendants for its recovery and was held entitled to a verdict. He had subscribed his money for one purpose only; it had not been applied, nor was there any longer any intention to apply it for that purpose, and it was, therefore, the duty of the defendants to return it to him in full. The judgment of Littledale, J., upon the right of promoters of abortive schemes to charge the subscribers with expenses, is particularly valuable, and was as follows: "I am also of opinion that the plaintiff is entitled to recover, upon this general principle, that if persons set a scheme afoot, and assume to be the directors or managers, all the expenses incurred before the scheme is in actual operation must in the first instance be borne by them. When it is in operation, the expenses and charge of management should be borne by the concern, and then it may be fair that the preliminary expenses should be paid in the same way, for then the subscribers have the benefit of them. The prospectus put forth by these defendants stated that the money subscribed was to be placed out at interest. The plaintiff's sole object in paying the money must have been to have it so placed out, but during eighteen months it remained idle at the bankers. Suppose there had been no subscribers, the projectors must have paid all the

[1] 8 B. & C. 814.

expenses. If, then, one person only subscribes, are all those expenses to be cast upon him? The hardship and injustice would be monstrous, yet that would be the consequence in such a case were we now to hold that the plaintiff was liable to a proportion of the expenses incurred by those defendants. With respect to the supposed partnership, it is plain that there could be none until the money was laid out in execution of the proposed scheme. I am, therefore, clearly of opinion that the plaintiff was entitled to recover."

A more recent case, to the same effect, is Walstab v. Spottiswoode,[1] in which it was held that a person, who had applied for shares in a projected railway company, and had agreed to sign the parliamentary contract and subscribers' agreement, was entitled to recover back the whole of the deposits paid in respect of the shares allotted her, it being proved that the formation of the company had been abandoned. The deed she undertook to execute does not appear ever to have been prepared.

These cases have always been considered as leading authorities, and they have been constantly recognized and followed.[2] Their principle applies, whatever the object of the company when established may be, and to companies formed on the cost-book system as well as to others.[3] Moreover, if an allottee of shares undertakes to sign some deed which is referred to and that deed is not in existence, but a deed said to be the one referred to, is afterward prepared, he is not bound to execute that if it is inconsistent with the contract into which he has already entered. Consequently, where a person applied for shares in a projected railway and paid his deposits, and undertook to sign the parliamentary contract and subscribers' agreement, and one was afterward prepared authorizing the promoters of the company to apply the deposits in defraying preliminary expenses, it was held that this was not such a deed as it was obligatory upon the allottee to execute, and that the company having proved abortive he was entitled to recover his deposits although it would have been otherwise had he executed the deed.[4]

It need hardly be observed that if a person has agreed to pay a deposit as a consideration for certain shares, and the consideration for

---

[1] 15 M. & W. 501.

[2] See Moore v. Garwood, 4 Ex. 681; Ashpitel v. Sercombe, 5 id. 147; Coupland v. Challis, 2 id. 662; Owen v. Challis, 6 C. B. 115; Ward v. Londesborough, 12 id. 252; Mowatt v. Londesborough, 3 E. & B. 907.

[3] John v. Goslett, 18 C. B. 728; and 8 C. B. (N. S.) 569. In this case the company was actually at work and its formation had never been abandoned. But its formation, on the terms originally agreed upon, was abandoned, and the plaintiff had not assented to any others.

[4] Ashpitel v. Sercombe, 5 Ex. 147.

his agreement has failed, he is not compellable to pay the deposit.[1] But if a person undertakes to pay deposits by a certain day, it is no defense to an action for not paying them on or before that day, that since that day the projected company has become abortive, for, perhaps that would not have been its fate if the subscriptions had been paid as promised, and *ex hypothesi*, the promise was broken before the circumstances relied on as an excuse for its breach occurred.[2]

In the cases referred to above, the deposits were held returnable upon the ground that they had been paid for one purpose only, and that such purpose had become unattainable. In those about to be referred to, the deposits were held not returnable, although the company subscribed to had proved abortive, for the contract of the parties showed that the deposits were properly applicable in discharge of the expenses incidental to the attempt to form the company.[3]

Garwood v. Ede[4] is a case of this description. There the plaintiff had paid deposits on shares in a projected railway, and had signed a deed which authorized the promoters to defray the expenses incidental to the undertaking out of the deposits paid for shares.[5] Under these circumstances it was held that, although the scheme for the railway proved abortive, the deposits paid by the subscribers for shares in it were not returnable.

Clements v. Todd[6] was decided on the same principle, for although the plaintiff had not signed any such deed as that signed in the last case, there was a deed which he had undertaken to sign, and he had accepted scrip certificates which stated that he had signed it. He was, therefore, held to have authorized the application of his deposits in the discharge of preliminary expenses as mentioned in the deed.

Jones v. Harrison[7] is another instance of the same kind, only the authority to defray preliminary expenses out of the deposits was conferred by the terms of the letter of allotment, and not by any deed intended for execution after the allotment was made.

Upon precisely the same principle it was held in the recent case of Aldham v. Brown,[8] that where a person had covenanted to pay a

---

[1] Duke v. Andrews, 2 Ex. 290.

[2] Duke v. Dive, 1 Ex. 36; Duke v. Forbes, id. 356; Aldham v. Brown, 7 E. & B. 164; see Woolmer v. Toby, 10 Q. B. 691, as to who ought to sue in such cases.

[3] See Baird v. Ross, 2 M'Queen, 68, 69.

[4] 1 Ex. 264; see too, Watts v. Salter, 10 C. B. 477; Vane v. Cobhold, 1 Ex. 798; Atkinson v. Pocock, id. 796.

[5] Meaning the preliminary expenses. See Willey v. Parratt, 3 Ex. 211; Baird v. Ross, 2 M'Queen, 69.

[6] 1 Ex. 268; compare Ashpitel v Sercombe, 5 Ex. 147; Sibson v. Edgworth, 2 De G. & Sm. 73.

[7] 2 Ex. 52; see, too, Willey v. Parratt, 3 Ex. 211; Baird v. Ross, 2 M'Queen, 61.

[8] 7 E. & B. 164; see, too, Duke v. Dive, 1 Ex. 36; Duke v. Forbes, id. 356.

deposit which was to be applicable, among other things, to the discharge of the expenses of forming a company, he was bound by his covenant, and was liable to an action upon it, although, before the action was brought, the formation of the company had become impossible.

The cases of Garwood v. Ede,[1] and Watts v. Salter,[2] which decided that a person who had paid deposits and executed a deed authorizing their application in payment of preliminary expenses, could not recover the deposits so paid, are not to be regarded as authorities for the proposition that the execution of such a deed necessarily, and under all circumstances, precludes the recovery back of the deposits. If the execution of the deed has been induced by fraud, the right to recover the deposits is unaffected by such execution,[3] and although it was said in Watts v. Salter that in the absence of fraud the deed, and that alone, regulated the rights of the contracting parties, yet this doctrine has not altogether met with approbation, and in a late case where the promoters of a railway company had in their circulars and letters of allotment expressly undertaken to return their deposits in full, if the necessary act of Parliament could not be obtained, it was held, first by the Court of Queen's Bench, and afterward by the Exchequer Chamber, that the deposits paid were recoverable in full, even by persons who had executed a deed whereby it was expressly stipulated that the promoters should be indemnified out of the funds of the company and by the subscribing shareholders against all expenses.[4] The promoters, in order to induce persons to take shares, to pay deposits, and execute the deed, promised to return all deposits in full in a given event, and it could never have been intended that a person by executing the deed should lose the benefit of that promise.

Before leaving this subject it may be as well to observe that in order that an action for the recovery back of deposits may be successful, the plaintiff must prove that the money he seeks to recover was paid to the defendants or to their agents. For, in the absence of such proof, however clear the right of the plaintiff may be to have his money back, he will have established no case against the individuals from whom he seeks to recover it.

In Nockels v. Crosby, Welstab v. Spottiswoode, and the cases of

[1] 1 Ex. 264.

[2] Wontner v. Shairp, 4 C. B. 404; Jarrett v. Kennedy, 6 id. 319; compare Vane v. Cobbold, 1 Ex. 798, and Atkinson v. Pocock, id. 796; Watts v. Salter, 10 C. B. 477.

[3] 10 C. B. 477.

[4] Mowatt v. Lord Londesborough, 3 E. & B. 307. In this case interest on the deposit had been demanded, and was recovered from the time of the demand.

that class already referred to, the plaintiff proved that he had paid his deposits to the bankers appointed by the defendants to receive them, and this was quite sufficient.[1] But it must be borne in mind that the promoters of companies are not partners, and that in order that any particular promoter may be liable to return deposits paid into a bank to the account of the company, it must be shown that he authorized the bank to receive the deposits on the account to which they have been paid. The following cases illustrate this:

In Watson v. The Earle of Charlemont,[2] the plaintiff brought an action against three persons to recover deposits paid by him for shares in an abortive company. The three defendants were members of the committee of management. The letter of allotment sent to the plaintiff was signed by the secretary to the company, and contained a list of banks into any of which deposits might be paid. The plaintiff had paid his deposits into one of these banks, and had received from the bankers a receipt on account of certain persons as trustees for the company. Only one of the defendants was amongst the persons whose receipt of the money was thus acknowledged; and it was held that this evidence was insufficient to show a receipt by all the defendants, and the action therefore failed.

Burnside v. Dayrell,[3] is another instance of the same sort. The action there failed, because there was no evidence that the money sought to be recovered had ever been received by the defendant, or by any person on his behalf, except the fact that he was a member of the provisional committee, and of the committee of management, which was not enough.

In Drouet v. Taylor,[4] the plaintiff sued four directors, whose names appeared in the prospectus of a company. The prospectus stated who the bankers of the company were, and contained a statement that the deposits would be returned in full in the event of the non-prosecution of the undertaking. The plaintiff proved that he had paid his deposits to the bankers, but he did not prove when. One of the defendants was not shown to have been a director when that money was paid. His name was in the company's pass-book, but how it came there did not appear. The defendant in question denied that he had ever consented to be a director, or to be held out as such; he denied that he knew that his name was in the pass-book or in any

[1] See Maitland's Case, 4 De G. M. & G. 769.
[2] 12 Q. B. 856.
[3] 3 Ex. 264.
[4] 16 C. B 571. The preceding matter from p. 1372, is from Lindley on Part., pp. 108–113.

prospectus; he denied that he had ever acted as a director, although he had at times been with the other directors in their board-room. The jury found a verdict for the plaintiff, but the ruling of the judge at Nisi Prius having been excepted to, the court of appeals directed a new trial.

Actions between companies and their shareholders.

SEC. 880. With respect to ordinary actions between companies and their shareholders, little remains to be added to what has been said in the previous chapters.[1] The following subjects have, in fact, been already considered, viz. :

1. Actions between the promoters of companies and by and against persons who subscribed for shares.

2. Actions by shareholders for being improperly on or off a company's register, and for having had his shares illegally forfeited.

3. Actions between the buyers and sellers of shares, and between them and the brokers employed by them.

It has also been seen that, as regards unincorporated companies, not represented by public officers, there are great difficulties, as well in the way of their suing, as of their being sued by their own shareholders. The proper and improper methods to which recourse is had in order to obviate these difficulties have been referred to, and it has been shown that the difficulties alluded to have no existence in actions between incorporated companies and their shareholders, nor in actions between public officers and the members of the companies they represent, if such actions are maintainable at all, which, speaking generally, they now are.

There only remains for consideration in the present place a few rules relating to actions for calls and dividends, and the remedy by *mandamus* in the case of the non-performance by companies of their duties toward their shareholders.

Actions for calls.

SEC. 881. An action for calls must be brought in the name of the company, if it is incorporated, and in the name of the public officer if the company is empowered to sue its shareholders in that manner.[2]

---

[1] If a company is merely a large partnership, one shareholder cannot sue another at law for a debt owing to him by the company, nor is such an action sustainable by a person who is substantially, though not actually a shareholder, *e. g.*, a *cestui que trust* of an ostensible owner of a share. See Goddard v. Hodges, 3 Tyr. 209, and 1 Cr. & M. 33.

[2] Chapman v. Milvain, 5 Ex. 61; Wills v. Sutherland, 4 id. 211; Skinner v. Lambert, 4 Man. & Gr. 477; Lawrence v. Wynn, 5 M. & W. 355; Smith v. Goldsworthy, 4 Q. B. 430.

Several of the modern acts of Parliament relating to companies contain provisions having for their object the simplification of the pleadings and proofs in actions for calls. These provisions will be found in the appendix. Their general effect is to render it necessary for a declaration in an action for calls, is to state merely that the defendant, as a shareholder, is indebted to the company in so much money for calls, omitting all statements respecting the making of the calls in question. As regards proof, the general effect of the provisions referred to is to render it necessary to show merely three things, viz.: first, that the calls sued for were made in point of fact; secondly, that the defendant is, or was, a shareholder when the call was made, and, thirdly, that he had proper notice of the making of the call.

In an action, or cross-action[1] for calls, the statutory form of declaration should be adopted in every case to which it is applicable.[2] But a declaration is not demurrable for containing averments which may be rejected as surplusage, and, therefore, a declaration by a company, governed by the Companies Clause Consolidation Act, averring not only that the defendant was a shareholder when the call was made, but that he still is a shareholder, has been held not to be bad, even on a special demurrer.[3] The form of declaration given by the Companies Clauses Act is not applicable to an action against an executor for calls made in the life-time of his testator.[4]

Calls made payable by statute, or by deed, are specialty debts, and an action for recovery is not, therefore, barred by the lapse of less than twenty years.[5]

The usual grounds of defense to an action for calls may be reduced to:

A denial that the defendant is a person liable to pay the call.

A denial of the making of the call in point of fact.

A denial that the call, admitted to have been made in point of fact, was authorized, was made by competent persons, or in the proper manner, or for proper purposes.

---

[1] By a plea of set-off, Moore v. Metropolitan Sewage Co., 3 Ex. 338.

[2] Wolverhampton, etc., Waterw. Co. v. Hawesford, 5 Jur. (N. S.) 1104; Dundalk, etc., Rail. Co. v. Tapster, 1 Q. B. 667; Newport, etc., Rail. Co. v. Hawes, 3 Ex. 476; Wilson v. Bilkerhead, etc., Rail. Co., 6 id. 626. The last case shows that a declaration in the statutory form is unobjectionable. See Howbeach Coal Co. v. Teague, 8 W. R. 264.

[3] Midland, etc., Rail. Co. v. Evans, 4 Ex. 649; East Lanc. Rail. Co. v. Croxton, 5 id. 287.

[4] Birkenhead, etc., Rail. Co. v. Cotesworth, 5 Eq. 226.

[5] Cork and Brandon Rail. Co. v. Goode, 13 C. B. 826. Compare Robinson's case, 4 De G. Mc. & G. 573.

A denial of any notice of the call.

A denial of such notice as the defendant was entitled to receive.

Infancy.

Fraud.

It must be borne in mind that if a shareholder does not avail himself of such defense as he may have at the proper time he will be precluded from afterward disputing either the validity or the call, or his liability to pay it.[1]

Nil debet is a bad plea to an action for calls due on a specialty, and a bad replication to a plea of set-off of such calls.[2]

Under a plea of never indebted, a defendant in an action for calls may show that he is not a shareholder,[3] and that the calls sued for have not been duly made.[4] Nevertheless, the court will allow a defendant both to plead never indebted and also to deny that he is a shareholder;[5] but it has refused to allow a defendant to plead with the general issue that the calls were made by persons not properly qualified;[6] that no notice of the call was given; that no time or place for receiving payments was appointed; that the calls were made for unauthorized purposes; that they were not made on all the subscribers and proprietors; that the shares in respect of which the call was demanded had been improperly created.[6]

Evidence of the making of a call is usually given by proving the resolution by which it was made, and this may be done either by testimony of the company's secretary or some other person having actual knowledge of the fact, or by the company's minute books, which, as in many cases, are made admissible as evidence of the facts stated in them.

Evidence that the defendant is or was a shareholder is given by the production of the company's register.

Evidence that the defendant received due notice of the making

---

[1] See Thames Haven, etc., Co. v. Hall, 5 Man. & Gr. 274; Thames Haven, etc., Co. v. Rose, 4 id. 552.

[2] Milvain v. Mather, 5 Ex. 55.

[3] Birkenhead, etc., Rail. Co. v. Brownrigg, 4 Ex. 426.

[4] London and Brighton Rail. Co. v. Wilson, 6 Bing. N. C. 135; South Eastern Rail. Co. v. Hebblewhite, 12 A. & E. 497; Shropshire Union Rail. Co. v. Anderson, 3 Ex. 401.

[5] Id.

[6] Id., and see further as to what pleas will and what will not be allowed, Waterford, etc., Rail. Co. v. Logan, 14 Q. B. 672; London and Brighton Rail. Co. v. Fairclough, 6 Bing. N. C. 270. In Aylesbury Rail. Co. v. Mount, 7 Man. & Gr. 898, a plea showing that the defendant was not a shareholder was held bad on special demurrer, as amounting to an argumentative denial of the debt; and, in Willis v. Bobinson, 5 Ex. 302, a plea that the persons stated to form a board of directors did not constitute such board, was held not warranted by leave to plead that the persons who made the call did not constitute a board of directors.

of the call must be given by showing that the requisite advertisements (if any) were published, and that such notice as he was entitled to receive either actually reached him or was so sent to him as to have probably reached him. This will be sufficient in default of evidence that what was so sent to him did not reach him.

Actions for dividends.

SEC. 882. Dividends, which are actually declared and payable by an incorporated company, are recoverable by action at law brought by the person legally entitled to receive them, against the company. The plaintiff must prove that the dividend sought to be recovered has been declared and has become payable, and that he is entitled at law to the dividend payable in respect of the shares by virtue of which he claims it. The circumstance that he is not a registered shareholder will not prejudice him if he has been wrongfully removed by the company from the register;[1] nor will the circumstance that the plaintiff is a married woman be fatal to her claim if she might have sued with her husband, and his non-joinder has not been pleaded in abatement.[2]

As was seen in the chapter on dividends, the non-payment of calls is, in most companies, an answer to an action for dividends, and even where it is not so, calls and dividends may, it is conceived, be set off against each other.

Whether a dividend declared by an unincorporated company can be recovered at law is a question of some difficulty. If those cases are excepted in which, on principles before explained, an action will lie by one partner against another for money in the hands of the latter payable to the former, it will perhaps not be going too far to say that the above question must be answered in the negative.[4] Even if the company is empowered to sue and be sued by a public officer, and an action by a shareholder against him for a dividend declared and payable might possibly lie, there would be very great, not to say insuperable difficulties in executing a judgment obtained by the plaintiff in such an action. It must be executed, if at all, against individual shareholders; but they clearly are not as such debtors to the plaintiff for the dividends he seeks to recover. No instance of an ordinary action by a shareholder against a public officer for dividends is known to the writer.

---

[1] Eastern Union Rail. Co. v. Symonds, 5 Ex. 237.

[2] Dalton v. Midland Rail. Co., 12 C. B. 458, and 13 id. 474.

[3] Id.

[4] See Lyon v. Haynes, 5 Man. & Gr. 504. The foregoing is from Lindley on Part. pp. 745–748.

Of set-off by and against companies.

SEC. 883. In actions and suits between companies on the one hand and non-members on the other, there is little to be said upon the subject of set-off, except that the ordinary rules are applicable.

It is only when a company sues or is sued by one of its own members, or when one member of a company, having obtained judgment against it, seeks to enforce such judgment against a co-member, or when a company is being wound up, that questions of set-off present peculiar difficulties. These are matters, however, which this is not the place to discuss, and the only observation which requires to be made here is, that in actions and suits between a company on the one hand and one of its own members on the other, the latter is so far treated as a stranger to the company, that cross demands between him and other members, as distinguished from cross demands between him and the company, cannot be gone into. As regards incorporated companies, this follows from the circumstance that they are distinct from the members composing them; that a debt due from or to several persons jointly cannot be set off against a debt due to or from some or one of them only.

Moreover, if a member of an unincorporated joint-stock company is a creditor of the company, and is in a position to sue the other members or any of them at law, a court of equity will not interfere to stay the action, on the ground that, if the company were wound up, and its accounts taken, the plaintiff at law would be found indebted to the company as a shareholder thereof. In such a case as that now supposed, the plaintiff at law sues as a non-member; and if his demand is one capable of being enforced at law, a court of equity will not interfere upon the ground that, in his character of member, he is indebted to his co-shareholders. This is well illustrated by a recent case before Lord Cottenham, which may be conveniently noticed here, although it will have to be referred to again in connection with another subject. In the case in question, Rheam v. Smith,[1] the plaintiff and one of the defendants were members of an unincorporated joint-stock company; the defendants were the bankers of the company, and had sued the plaintiff for a debt due by the company to the defendants as bankers. The plaintiff thereupon filed a bill against the bankers and the company, upon the ground that he ought not, as between himself and the bankers (one of whom was a

[1] 3 Ph. 726. See, too, Hammond v. Ward, 3 Drew. 103; Hardinge v. Webster, 1 Jur. (N. S.) 88.

shareholder) to pay more than what, on taking the accounts of the company, would be found to be due from the plaintiff in respect of the debt in question. The bill accordingly prayed that the accounts of the company might be taken, and its affairs wound up, and that provision might be made for due payment of the debts of the company, and that in the meantime the action, and all proceedings therein, might be stayed. A demurrer to the bill was overruled by the Vice-Chancellor, who, it is said, treated the case as one in which a partnership of A and B was suing the partnership of A, C, and D, in which case it would be contrary to equity to allow the debt to be recovered without first ascertaining for what proportion of it A was himself liable.[1] But on appeal to the Lord Chancellor, the decision below was reversed, and the demurrer was allowed, the Lord Chancellor observing, "It really seems to me that, if the principle on which this demurrer is said to have been overruled by the Vice-Chancellor were admitted, it would lead to the most frightful consequences; for it comes to this, that if a railway company, or any company carrying on great works, and who may have become indebted to some contractor in half-a-million of money for work done, upon that contractor applying for payment of his debt, can find out that he, or any one connected with him in business, holds a single share in the company, they may say, No, we cannot pay our debt; you must first break up the company, and ascertain whether its assets are sufficient for payment of its debts, for if not, you or the persons connected with you will be liable to contribute to the very sum which you seek to recover. It is impossible to stop short of that if the principle be once admitted. After some difficulty a rule has been established at law, enabling creditors of these great companies to enforce their claims against individual shareholders, leaving them, of course, to their right to contribution against their copartners. The rule, no doubt, leads sometimes to hardship upon the party sued, but the balance of convenience is in its favor, and for that reason it has been adopted; because it would be a still greater hardship upon parties dealing with such companies, if the enforcement of their claims were to be embarrassed by the necessity of treating all the members of the company as jointly responsible. This suit, however, is an attempt to induce a court of equity to interfere with that rule, for the plaintiff, by his bill, asserts in effect nothing short of this proposition: If I can find

[1] The fact that such an action could not be maintained at law is not noticed in the report. But it is clear that although one partner may under certain circumstances sue another at law, A. and B cannot possibly sue A. and C.

out that you who are suing me at law have a single share in the company against whom the claim is made, then there is an end to your legal right; equity will interfere, and though your money may have contributed to the establishment of the company, you shall not be permitted to recover a single farthing against any member of the company until the concern is altogether wound up."

Execution against companies and their shareholders.

SEC. 884. By the law of this country a judgment can only be obtained against a company in an action against the company sued, in its corporate name if it is incorporated, or in the name of its public officer if it is not incorporated, but is empowered to be sued in the name of such officer as its representative. A judgment against an incorporated company cannot by common law be executed except against the property of the company, and a judgment against an individual cannot, by common law, be executed against any person or property except the person or property of the individual named in the judgment. In order, however, to give creditors a more extensive remedy than they would have at common law upon a judgment obtained against companies, either in their corporate names or the names of their public officers, the legislature has rendered such judgments enforceable against the individual members of the companies. For this purpose three schemes have been had recourse to.

The first in point of time was applicable to companies empowered to sue and be sued, and was as follows: A creditor, having obtained judgment against the public officer, was allowed to proceed upon that judgment by *scire facias* against any of the shareholders in the company at the time the judgment was obtained, and, if necessary, also against such of the late shareholders as were members of the company when the debt was contracted.

The next device was a mere modification of the last, and consisted in the application of it to judgments against companies by their corporate names, which judgments were made enforceable against shareholders and former shareholders in substantially the same manner as that above explained; a qualification, however, was added, to the effect that recourse should not be had against individual shareholders until efforts had been made in vain to obtain payment from the company, and as to some companies, that recourse should not be had against any shareholder except to the extent of his shares.

The third and last device was altogether different, and was the result of the course adopted by creditors, who, when they could not

obtain satisfaction from companies, singled out some unfortunate shareholder and compelled him to pay the whole amount for which judgment had been recovered. This course, thought by some to be quite proper, was deemed by others to be in the highest degree cruel, and the opinion of the latter had sufficient support to induce Parliament when legislating on joint-stock companies, in 1856, to leave out all those clauses found in the preceding acts enabling creditors to execute judgments against individual shareholders, and to provide, instead, that creditors should have the power, upon non-payment of the debts due to them from the company, to cause it to be wound up. Consequently, a creditor of a company governed by the Joint-Stock Companies Act of 1856, can only execute a judgment obtained against the company by proceeding against the corporate property, and, if necessary, by having recourse to a petition for winding up the company.

Such is a general outline of the manner in which a creditor of a company has been enabled to obtain satisfaction of a judgment recovered against it. To fill up this outline so far as is possible without alluding to the winding up of companies, is the object of the remainder of the present section.

As to execution against the company or person named in the judgment.

SEC. 885. A judgment against a corporation is executed against the corporate property in the same way as a judgment against an individual is executed against his property; and a judgment against a public officer may, it is conceived, be executed against him and his property as if he were an ordinary individual, where the right of the judgment creditor is not in this respect modified by statute.[1]

The Banking Act of Geo. IV requires the public officers of a company governed by that act, to be members of the company,[2] and enacts that execution upon any judgment obtained against a public officer may be issued against any member of the company. From this it follows that a public officer of a company governed by the act in question is personally liable upon every judgment obtained against him, and that writs can issue against him grounded on such judgment, and that no *sci. fa.* or other intermediate proceeding is necessary.[4] If, indeed, the public officer named in the judgment has ceased to be a member of the company, then, by the act, he is only liable like other

[1] See Harrison v. Timmins, 4 M. & W. 510; Wormwell v. Hailstone, 6 Bing. 668, where the nominal defendant was held not liable to execution; and Corpe v. Glyn, 3 B. & Ad. 801, where he was held not liable to an attachment.

[2] 7 Geo. 4, c. 46, s. 4.

[3] Id., s. 13.

[4] Harwood v. Law, 7 M. & W. 203.

former shareholders; and upon an affidavit by him, the court will stay execution against him until after he has been proceeded against by *scire facias*.[1]

The Letters Patent Act[2] does not require the public officers of a company governed by it to be members of the company, and even if they are members their liabilities are restricted to the extent specified in the letters patent of their respective companies. These circumstances alone, it is conceived, render it improper for a creditor to issue execution against a public officer of a company governed by the Letters Patent Act without a *sci. fa.*; for it is clear from the act that he cannot be made personally liable unless he is or has been a member, and in neither case is he liable to the extent to which he would be liable at common law.

Acts of Parliament are sometimes met with which empower a company to sue and be sued by a public officer, but which, instead of giving any remedy against him or the other shareholders individually, render the funds of the company alone liable to its creditor. In such a case no execution against the public officer of the company, or against any of its shareholders, can be issued;[3] but an action against the public officer will nevertheless lie, even although there may be no funds, and the plaintiff may consequently have no means of enforcing his judgment after he has obtained it.[4] Indeed, if there are funds, the only mode in which a creditor can get at them has been said to be by mandamus, or by a bill in equity.[5]

Even before the Common Law Procedure Act of 1854, the 68th section of which considerably extends the power of courts of law to grant a mandamus,[6] it had been held that a creditor of a company, who, by virtue of its act of Parliament, had no remedy against its shareholders, but only against the funds of the company, was entitled to a mandamus to its treasurer and directors, after establishing his debt in an action.[7] If there are no funds, and the company is not under an obligation to provide any, no mandamus can be granted;[8] but if the company is under an obligation to provide funds, and it

---

[1] See Harwood v. Law, 7 M. & W. 203.

[2] 7 Wm. IV, & 1 Vict., c. 73.

[3] See Harrison v. Timmins, 4 M. & W. 510; Wormwell v. Hailstone, 6 Bing. 668; Corpe v. Glyn, 3 B. & Ad. 801.

[4] See Kendall v. King, 17 C. B. 483.

[5] See the cases in the last two notes. Actions have been brought in such cases, as in Cane v. Chapman, 5 A. & E. 647; but see Addison v. The Mayor of Preston, 12 C. B. 108.

[6] See Norris v. The Irish Land Co., 8 E. & B. 512, correcting Benson v. Paull, 6 E. & B. 273.

[7] See Corpe v. Glyn, 3 B. & Ad. 801; R. v. St. Katharine Dock Co., 4 id. 360.

[8] R. v. The Victoria Park Co., 1 Q. B. 288.

will take no measures to raise them, it seems that a mandamus will go.[1] It is, however, to be observed that a writ of mandamus will not be granted if the only reason why payment cannot be obtained by execution in the ordinary way, is that there is nothing to seize.[2]

As to proceedings against shareholders upon a judgment obtained against a company or its public officer.

SEC. 886. By the common law, a judgment against A cannot be executed against B without a *scire facias*, which, though a judicial writ, is in the nature of an action, and may be pleaded to in abatement or in bar. The object of the *sci. fa.* is technically to make the execution conformable to the judgment, but substantially its object is to give the person against whom the judgment is sought to be enforced an opportunity of defending himself, for, *ex hypothesi*, he has not had that opportunity before.[3]

Unless there is some statutory enactment to the contrary, a judgment obtained in this country[4] against a company in its own name, or in the name of its public officer, cannot be executed against a shareholder in the company without a *sci. fa.*

In Bartlett v. Pentland,[5] judgment was obtained against the public officer of a company, and a shareholder was taken in execution on a *ca. sa.* sued out upon the judgment without any intermediate proceeding, but the court set aside the execution and discharged the shareholder who had been arrested. In this case it was urged in argument, and apparently thought by the court, that the execution creditor should have obtained leave to enter a suggestion upon the record, that the person proposed to be proceeded against was a member of the company; but it is now settled that the proper mode of proceeding is by *scire facias*, unless some other mode is expressly authorized by statute.[6]

See as to shares.

SEC. 887. Shares in public companies are rendered available for the payment of the separate debts of their holders by a very different method from that to which recourse must be had in the case of partnerships. There is no interference with the company or its property

[1] Id.

[2] See R. v. The Victoria Park Co., 1 Q. B. 288.

[3] See, generally, as to *sci. fa.* Com. Dig. Pleader, 3 L.; Bac. Ab. *Sci. fa.*, and the note to Underhill v. Devereux, 2 Wms. Saund. 71.

[4] A judgment obtained in a colony may be sued upon in an action in the ordinary form. Bank of Australia v. Nias, 16 Q. B. 717.

[5] 1 B. & Ad. 704.

[6] Clowes v. Brettell, 10 M. & W. 506; Wingfield v. Barton, 2 Dowl. (N. S.) 355, and 7 Jur. 258; Wingfield v. Peel, 12 L. J. (N. S.) 102, Q. B.

by the sheriff, but the judgment creditor applies to one of the judges of the superior courts of common law[1] for an order charging the shares of the judgment debtor with payment of the debt for which judgment has been recovered. Such an order has the effect of a charge made by the debtor himself in favor of the creditor, subject, however, to this qualification, that no proceedings can be taken to have the benefit of the charge created by the order until the expiration of six calendar months from its date.[2] An order *nisi* may be obtained *ex parte*, and without notice to the debtor; and it restrains the company from permitting a transfer of the shares held by the debtor or by any person in trust for him until the order is made absolute or discharged, and if the company permits a transfer of the debtor's shares during the continuance of the order, the company becomes liable to the creditor to the extent of the value of the shares transferred.[3]

In form, an order *nisi* is, "that unless cause be shown to the contrary by the judgment debtor within a given time, the shares in the ——— company, standing in the name of ———, shall be, and shall in the meantime stand, charged with the payment of the amount for which judgment has been recovered, and costs and interests thereon, pursuant to the statute 1 & 2 Vict., c. 110.[4] The order *nisi* prevents the shares from being transferred or dealt with, but the charge created by the order dates from the time the order is made absolute.[5] For the purpose of obtaining the benefit of the order application must be made to a court of equity for a foreclosure or sale.[6]

If the creditor causes the debtor to be arrested before the shares have been applied in satisfaction of the debt, the benefit of the charging order is lost.[7]

The statute which enables shares to be charged in the manner above explained, applies only to "public companies;" but there is no statutory or other authoritative definition of this phrase, and questions of

[1] Miles v. Presland, 4 M. & Cr. 431; Hulkes v. Day, 10 Sim. 41; but see Wells v. Gibbs, 22 Beav. 204; Westby v. Westby, 5 De G. & S. 516; Stanley v. Bond, 7 Beav. 386. In re Connell, 25 L. J. (Ch.) 649, the order was made by an equity judge in the course of winding up a company. The shares charged were shares in another company, and they were charged for calls made in the winding up.

[2] See as to this Bristed v. Wilkins, 3 Ha. 235; Reece v. Wilkins, 5 De G. & S. 480.

[3] 1 & 2 Vict., c. 110, ss. 14 to 16; 3 & 4 Vict., c. 82.

[4] See Fowler v. Churchill, 11 M. & W. 57; Robinson v. Burbridge, 9 C. B. 289.

[5] See Warburton v. Hill, Kay, 470; Scott v. Lord Hastings, 4 K. & J. 633; Watts v. Porter, 3 E. & B. 743.

[6] As in Bristed v. Wilkins, 3 Ha. 235, and Macintyre v. Connell, 1 Sim. (N. S.) 225, 252.

[7] 1 & 2 Vict., c. 110, s. 16.

considerable difficulty may consequently arise with reference to many companies, as to whether they are "public" or not.

In Mackintyre v. Connell,[1] the only case in which the meaning of the expression "public companies" has been as yet much discussed, the court came to the conclusion, 1, that transferability of shares was not the test of publicity; 2, that the attribute of publicity could not be denied in the case of a company empowered to sue and be sued by a public officer, and required to keep a register of its shareholders, and to make official returns of their names and addresses.

Termination of liability in companies.

SEC. 888. In conformity with the general principles of agency, the directors of a joint-stock company continue to have power to bind it, not only as long as their appointment lasts, but also as long as its determination is unknown to the public. But this proposition must be taken in connection with the rule that the public are deemed to have notice of the contents of companies' acts of Parliament, charters and registered deeds of settlement, and, consequently, if it is sought to make a company liable for the acts done by its directors after their retirement from office, it must be ascertained whether, upon the principle alluded to, there was or not constructive notice of the cessation of their authority to act for the company.

A member of ordinary partnership may, even during the continuation of the partnership, determine the authority of his copartners to bind him, by giving proper notice. This is, in truth, only an instance of the more general proposition that an agent's authority is determinable by his principal at any time before the authority has been acted on. The question, how far a shareholder of a company can, by giving notice that he will not be responsible for the future acts of its directors, escape liability for debts subsequently contracted by them with a person reached by the notice, has not yet been decided. Nor is the question free from difficulty, for, admitting that, as between the company and the creditor, the notice amounts to nothing, not having been issued by the company, or by its agent, it does not, therefore, follow that the shareholder who gave the notice is not in a position to say to the creditor, "You dealt with those whom you knew were not *my* agents, and you have, therefore, no right to look to *me* for payment." On the other hand, the right of one shareholder thus to determine, even as far only as he is concerned, the authority of agents

[1] 1 Sim. (N. S.) 225.

appointed by himself and co-shareholders may not, unreasonably, be denied, and, unless such right exists, the notice would be of no avail. If the question should arise, the difficulty of deciding it on general principles might, possibly, be escaped by having recourse to the language of some statute applicable to the particular case.

When a shareholder ceases to be such, he obviously determines the authority conferred by himself upon the company and its agents to bind him. If he is a shareholder in a company which has no register of its members accessible to the public, he is in the position of a dormant partner, and, consequently, he cannot be made liable for what occurs after his retirement; and no notice of retirement is necessary except to those who knew him to be a shareholder.[1] But a person who is a shareholder in a company which has a register of its members accessible to the public is *prima facie* in a different position, and, reasoning from analogy, a retiring shareholder ought, in such case, to take care to have his name removed from the register, for, so long as it is there, he is held out as a shareholder. It is true that a person whose name is on the list of shareholders without his authority cannot be considered as holding himself out as a shareholder;[2] but it is quite consistent with this proposition that a person who has been properly registered as a shareholder, and has ceased to hold shares, but has taken no steps to have his name removed from the register, has not, as between himself and the public, retired from the company, and, if his liability to the public in respect of the company's debts and engagements depended upon ordinary principles of partnership law, that liability would continue until he gave notice to the public of his retirement by having his name removed from the register of shareholders. But here, as in other cases, the liability of shareholders turns on the wording of the statutes applicable to the companies in which they are shareholders, and too much reliance must not be placed upon the general principles applicable to partnerships.

The Joint-Stock Companies Act of 1856 goes so far as to render a late shareholder in a limited company liable for one year after he has ceased to be a shareholder, as if he had not ceased to be one at all.[3] The Letters Patent Act expressly enacts that a person ceasing to be a shareholder in a company to which that act applies, shall, for all

[1] See Acc. Northey v. Johnson, 19 Law Times, 104 Q. B. 1852, the case of a shareholder in a cost book mine.

[2] See Birch's case, 2 De G. & J. 10; Lofthouse's case, id. 69; Powis v. Butler, 4 C. B. (N. S.) 469, affirming S. C., 3 id. 645.

[3] 19 & 20 Vict., c. 47, s. 68.

purposes of liability, be considered as a continuing shareholder until the fact that he is not so has been registered.[1] But, as regards companies governed by other enactments, it will be found that, with respect to liability for future debts, their shareholders are in the position rather of dormant than of ostensible partners, their liability depending not so much on what appears from the company's register as on the fact of membership, of which the register is only *prima facie* evidence.[2]

Again, with respect to the liability of a late shareholder in a company for those debts and engagements of the company to which he was liable when he was a shareholder, it is necessary to consult the statute or charter by which the company in question is governed. Without referring to particular enactments at length, it may be stated generally that the ordinary principles of partnership law, as explained in the foregoing pages, have not been materially departed from in the case of ordinary joint-stock companies, except so far as regards the effect of lapse of time.

The following statutes, viz.:

The Joint-Stock Banking Act, 7 Geo. IV, c. 46, s. 13;

The Joint-Stock Companies Registration Act, 7 & 8 Vict., c. 110, s. 66;

The Joint-Stock Companies Banking Act, 7 & 8 Vict., c. 113, s. 10;

The Joint-Stock Companies Act, 1856, 19 & 20 Vict., c. 47, s. 62 (as to unlimited companies);

All contain provisions continuing the liability of shareholders in respect of past debts until the lapse of three years after they have ceased to be shareholders;[3]

The Letters Patent Act, 7 Wm. IV, and 1 Vict., c. 73, s. 34, also continues the liabilities of late shareholders, but it does not contain any provision limiting the duration of such liabilities;

The liability of shareholders in a limited company is continued for one year after they have ceased to hold shares (19 & 20 Vict., c. 47, s. 63);

The Companies Clauses Consolidation Act contains no provision continuing the liability of a shareholder after he has ceased to be such (8 & 9 Vict., c. 16, s. 36);

---

[1] 7 Wm. IV, & 1 Vict., c. 73, s. 21.

[2] See the section in the next chapter on Execution against Companies and their Shareholders.

[3] But note, the first three acts only render a late shareholder liable for debts contracted whilst he was a shareholder. The act of 1856 renders him liable for debts contracted before he became a shareholder, and whilst he continued to be so.

The liability of a retired shareholder to contribute to the debts of a company must not be confounded with his liability to creditors. For notwithstanding the continuance of his liability to creditors, he may be entitled to a complete indemnity from the other shareholders, and may not, therefore, be a contributory with them, and this is a common case. On the other hand, a shareholder may be freed from liability to creditors, but not be freed from liability to the other shareholders, to contribute with them to the payment of debts for which they only are directly liable. This, although not so common a case as the other, is still a possible case, and affords a striking illustration of the difference (constantly lost sight of by non-lawyers) between direct and indirect liability to the debts of a company.[1] This subject will be examined hereafter.

When shares in companies are specifically bequeathed.

SEC. 889. Shares in companies are frequently specifically bequeathed not only to a legatee absolutely, but also to a legatee for life, and after his or her death, to others. In the case of an absolute legacy, the shares should be transferred as soon as possible to the legatee, in order that the liability of the testator's estate in respect of them may be put an end to.[2] If the legatee is not *sui juris*, and the shares cannot be transferred into his name, the position of the executors becomes embarrassing. If, however, they do nothing with the shares, but simply take the dividends as executors, they will not render themselves personally liable to creditors,[3] nor will they be liable to be made contributories, otherwise than in their representative capacity.[4] But it may happen that unless the executors transfer the shares into the names of themselves or some other persons, the shares will become forfeitable, and in that case (the legatee of the shares being still supposed to be not *sui juris*) the executors must, for their own protection, apply for the direction of the Court of Chancery.

Where shares are bequeathed to one person for life with remainder to another, they ought nevertheless to be sold, unless it is clearly the testator's intention that they shall be retained in specie.[5] If they are intended to be enjoyed in specie, the position of the executors again becomes embarrassing, for if they transfer the shares into the name of the tenant for life, there is nothing to prevent the latter from sell-

[1] See Gouthwaite's case, 3 Mc. & G. 187.

[2] See Keene's Ex. case, 3 De G. Mac. & G. 272.

[3] Ness v. Armstrong, 4 Ex. 21.

[4] This subject will be adverted to when treating of Contributories.

[5] See Blann v. Bell, 2 De G. Mac. & G. 775; Thornton v. Ellis, 15 Beav. 193; Crowe v. Crisford, 17 id. 507.

ing them for his own use, and in case of a sale of the shares by him, the remainder man would naturally seek to make the executors responsible for their loss. If, on the other hand, the executors procure the shares to be transferred into their own names as trustees for the legatees, a personal liability in respect of the shares will be incurred by the executors, and that liability will not be limited by the amount of the assets of the testator. Unless, therefore, the executors can retain the shares without transferring them, they must again, for their own safety, apply for the direction of the Court of Chancery.

Where shares are bequeathed to one person for life with remainder to another, and are transferred into the name of the tenant for life, they will, on his death, be transferable into the name of the remainderman without being covered by the probate duty payable in respect of the tenant for life's estate.[1] Such shares, in fact, form no part of his estate, and are covered by the duty payable on account of the estate of the original testator.

As between the persons beneficially interested in the estate of a deceased shareholder, calls payable in respect of his shares must be paid out of that property which he may have appointed for the payment of his debts.[2] If the shares in respect of which the calls are payable have been specifically bequeathed, and if payment of those calls is requisite to enable the specific legatee to acquire a title to the shares, then the calls must be paid out of the testator's general personal estate.[3] But the specific legatee must pay all other calls, and consequently all which are made after he has, or might have, become a shareholder in respect of the shares bequeathed.[4] The specific legatee is entitled to all dividends which become payable after the death of the testator,[5] even though the resolution authorizing their payment may have been passed in his life-time.[6]

Where shares are specifically bequeathed, and calls upon them are payable out of a testator's residuary estate, a fund ought to be set apart for the indemnity of the specific legatee;[7] but, as already observed, where the assets of the deceased are insufficient for the payment of his debts, no fund to meet future calls ought to be set apart to the prejudice of even simple contract creditors.[8]

[1] Hennell v. Strong, 25 L. J. Ch. 407.
[2] Blount v. Hipkins, 7 Sim. 51.
[3] Clive v. Clive, Kay, 600; Jacques v. Chambers, 4 Ra. Ca. 499, correcting S. C., 2 Coll. 435; Wright v. Warren, 4 De G. & S. 367.
[4] Armstrong v. Burnet, 20 Beav. 424; Adams v. Ferick, 26 id. 384; Day v. Day, 8 W. R. 288.
[5] Jacques v. Chambers, 2 Coll. 435; Wright v. Warren, 4 De G. & S. 367.
[6] Clive v. Clive, Kay, § 600.
[7] Jacques v. Chambers, 4 Ra. Ca. 499.
[8] Wentworth v. Chevell, 3 Jur. (N. S.) 805, V. C. K. See, too, Read v. Blount, 5 Sim. 567, and compare Atkinson v. Grey, 1 Sm. & G. 577.

A legacy of shares in a company is not adeemed by the conversion of such shares into stock;[1] nor, necessarily, by the amalgamation of that company with another.

In a recent case, it was held that a bonus declared before a testator's death, but payable after his death, did not belong to the specific legatee of the shares in respect of which the bonus was payable, but fell into the residue of the testator's estate.[2]

Profits, division of.

SEC. 890. It must not be supposed that there can be no profits to divide so long as a company is in debt, or that it is improper for a company to declare dividends if any of its debts remain outstanding. The creditors of a company may be willing to allow their principal moneys to continue unpaid, provided they are punctually paid the interest upon them; and if a company, after defraying all current expenses and the interest of its debts, has a surplus arising from its current receipts, there is no principle either of law or morality which requires that such surplus shall be accumulated, or forbids its division as profit amongst the shareholders. Whether dividends shall be paid whilst debts remain unpaid, or whether the whole or any part of the surplus of receipts over expenditure shall be accumulated or divided, are questions which it is competent for the majority of shareholders to decide.[3]

As a rule, all the shareholders in a company are entitled to share profits *pari passu* in proportion to the number of shares they respectively hold; and a resolution by a majority that dividends shall be paid to some of the shareholders in preference to, or to the exclusion of the others, is clearly illegal unless it is warranted by something more than the will of those who make it.[4] But it is by no means unusual for companies who have expended their original capital, to raise (under some power specially conferred upon them for the purpose) further capital by the issue of "preference shares," *i. e.*, of shares the holders of which are to be entitled to share profits, up to a given amount, in preference to the other shareholders. Where such shares have been issued by competent authority, the terms upon which they have been issued must of course be adhered to, and it has been decided in several recent cases that preference shareholders

[1] Oakes v. Oakes, 9 Ha. 666.

[2] Loch v. Venables, 8 W. R. 121; also reported in 6 Jur. (N. S.) 288.

[3] See Stephens v. South Devon Rail. Co., 9 Ha. 313; see, too, Browne v. Monmouthshire, &c., Co., 13 Beav. 32, as to declaring dividends whilst works are unfinished.

[4] See Adley v. Whitstable Co. 17 Ves. 315, and the cases in the next note.

are entitled to be paid their dividends to the amount guaranteed, before the other shareholders receive any thing; so that if the profits divisible at a given time are not sufficient to pay the guaranteed dividends in full, the deficiency must be made good out of the next divisible profits, the ordinary shareholders taking nothing until all arrears of guaranteed dividends have been paid to the preference shareholders.[1]

No resolution of a company can possibly vary the rights of the holders of different classes of duly created shares. No resolution can deprive preference shareholders of their right to be paid the sums guaranteed out of the company's profits as soon as there are any. So long as there are no profits, the preference shareholders get nothing, for they are not creditors of the company; but as soon as there are any profits to divide, they must be applied in payment of whatever is required to make up to the preference shareholders the sums guaranteed to them, including all arrears.[2]

Where there are several classes of shares on which unequal sums have been paid up, the profits of the company ought, *prima facie*, to be divided amongst the shareholders in proportion to the sums paid up on their respective shares, and not in proportion to the nominal values of such shares.[3]

[1] See Stevens v. South Devon Rail. Co., 9 Ha. 313; Henry v. Great Northern Rail. Co., 4 K. & J. 1, and 1 DeG. & J. 606; Sturge v. Eastern Counties Rail. Co., 7 DeG. Mac. & G. 158; Crawford v. North Eastern Rail. Co., 3 K. & J. 723.

[2] See the cases cited in the last note.

[3] See Somes v. Currie, 1 K. & J. 605. The foregoing six sections are from Lindley on Partnership.

CHAPTER XXXVIII.

OF JOINT-STOCK COMPANIES BY STATUTE.

SEC. 891. Statutory companies.
SEC. 892. Banking companies.
SEC. 893. Actions by and against.
SEC. 894. Canal companies.

Statutory companies.

SEC. 891. Although it is not within the scope and design of this treatise to enter minutely into the construction of the various acts of Parliament which have been passed for the protection and regulation of joint-stock companies, yet it may be expected that a general view should be given of some of the leading enactments on this subject. And first, it may be noticed that, by the stat. 1 Vict., c. 73, power is given to the Crown by letters patent to limit the responsibility of shareholders, and to authorize a more convenient mode of suing and being sued than is warranted by the common law. As it is intended, however, to include that statute in the appendix to this work, it is unnecessary to particularize its provisions in this place.

Banking companies.

SEC. 892. The most important companies (not being bodies corporate), for which provisions are made by statute, are joint-stock banking companies. By recent acts of Parliament, those companies have been allowed certain advantages, both in respect to the numbers of their members, and their power of suing and being sued, which previously, by reason of certain statutable restrictions, they were not permitted to enjoy.

The restriction which formerly existed as to the numbers of partners in private banks arose from a desire on the part of the legislature to support the exclusive privilege of the Bank of England, which privilege is in substance this: that there shall not be a bank of issue of any thing which is a substitute for money, and to circulate as such

during the continuance of the Bank of England.[1] Therefore, by virtue of the several Bank Acts which preceded the stat. of 7 Geo. 4, c. 46, no company or partnership in England exceeding the number of six persons, other than the Bank of England, could trade as a bank of circulation and issue, or, in the words of the statute of Anne, could "borrow, owe, or take up any sum or sums of money on their bills or notes, payable at demand, or at any less time than six months from the borrowing thereof."[2]

By the 3 and 4 Will. 4, c. 98, sec. 3, any body politic or corporate, or society or company, or partnership, although consisting of more than six persons, may carry on the trade or business of banking in London, or within sixty-five miles thereof, provided that such body politic or corporate, or society, or company, or partnership, do not borrow, owe, or take up in England, any sum or sums of money on their bills or notes payable on demand, or at any time less than six months from the borrowing thereof, during the continuance of the privileges granted by this act to the governor and company of the Bank of England.

Upon the construction of this last-mentioned enactment, the terms of which it will be perceived are borrowed from the statute of Anne, it has been held that a London joint-stock banking company, consisting of more than six persons, cannot accept a customer's bill at less than six months date, for the acceptance of a bill under such circumstances is a "borrowing" in point of law, and, at all events, the meaning of the term "borrow" must be taken to be substantially the same as "owe" or "take up," and that such a transaction amounts to an "owing" by the banker to his customers there can be no doubt.[3]

Actions by and against.

SEC. 893. With respect to actions and suits by and against joint-stock banking companies, the 7 Geo. 4, c. 46, sec. 9, enacts, "that all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons, who may be at any time indebted to such copartnership carrying on business under the provisions of this act, and all proceedings at law or in equity, under any commission of bankruptcy and all other proceedings at law or in equity to be commenced or instituted for or on behalf of any such copartnership, against any person or persons, bodies politic or corpor-

[1] Per Maule, arguendo, 3 Bing. N. C. 601.

[2] See stats. 8 and 9 Will. 3, c. 20; 6 Anne, c. 22.

[3] Bank of England v. Anderson, 3 Bing. N. C. 589; 2 Keen, 328; see, also, Bank of England v. Booth, 2 id. 466, and per Lord Denman, Sims v. Bond, 5 B. & Ad. 389; Penny's Cyclop., tit. Bank.

ate, or others, whether members of such copartnership or otherwise, for recovering any debts, or enforcing any claims or demands due to such copartnership, or for any other matter relating to the concerns of such copartnership, shall and lawfully may, from and after the passing of this act, be commenced or instituted and prosecuted in the name of any one of the public officers, nominated as aforesaid, for the time being, of such copartnership, as the nominal plaintiff or petitioner for and on behalf of such copartnership; and that all actions or suits, or proceedings at law or in equity, to be commenced or instituted by any person or persons, bodies politic or corporate, or others, whether of such copartnership or otherwise, against such copartnership, shall and lawfully may be commenced, instituted and prosecuted against any one or more of the public officers, nominated as aforesaid, for the time being, of such copartnership, as the nominal defendant for and on behalf of such copartnership."

It seems to have been doubted whether, under the provisions of this act, a joint-stock banking company could have brought an action against any of their own shareholders; and it is apprehended that, in order to remedy this doubt, amongst others, the stat. 1 & 2 Vict., c. 96, was passed; which, after reciting the before mentioned clause in the 7 Geo. 4, c. 46, and a similar clause in the Irish statute of 6 Geo. 4, c. 42, enacts "that any person now being or having been, or who may hereafter be or have been, a member of any copartnership now carrying on or which may hereafter carry on the business of banking under the provisions of the said recited acts, may, at any time during the continuance of this act, in respect of any demand which such person may have, either solely or jointly with any other person, against the said copartnership, or the funds or property thereof, commence and prosecute, either solely or jointly with any other person (as the case may require), any action, suit, or other proceeding, at law or in equity, against any public officer appointed or to be appointed, under the provisions of the said acts, to sue and be sued on the behalf of the said copartnership; and that any such public officer may, in his own name, commence and prosecute any action, suit, or other proceeding, at law or in equity, against any person being or having been a member of the said copartnership, either alone or jointly with any other person, against whom any such copartnership has or may have any demand whatsoever; and that every person being or having been a member of any such copartnership shall, either solely or jointly with any other person (as the case may require), be capable of pro-

ceeding against any such copartnership by their public officer, and be liable to be proceeded against, by or for the benefit of the said copartnership, by such public officer as aforesaid, by such proceedings and with the same legal consequences as if such person had not been a member of the said copartnership; and that no action or suit shall in anywise be affected or defeated by reason of the plaintiffs or defendants, or any of them respectively, or any other person in whom any interest may be averred, or who may be in anywise interested or concerned in such action, being or having been a member of the said partnership; and that all such actions, suits and proceedings shall be conducted and have effect as if the same had been between strangers."

The 4th section enacts "that no claim or demand which any member of any such copartnership may have in respect of his share of the capital or joint-stock thereof, or of any dividends, interest, profits, or bonus, payable or apportionable in respect of such share, shall be capable of being set off, either at law or in equity, against any demand which such copartnership may have against such member on account of any other matter or thing whatsoever; but all proceedings in respect of such other matter or thing may be carried on as if no claim or demand existed in respect of such capital or joint-stock, or of any dividends, interest, profits, or bonus payable or apportionable in respect thereof."

In the late case of Ex parte Hall,[1] a question arose, founded on the decision in Guthrie v. Fisk,[2] whether, upon the construction of the two acts of 7 Geo. 4, c. 46, and 1 & 2 Vict., c. 96, or either of them, a banking company could, through the medium of their public officer, sue out a fiat in bankruptcy against one of their own shareholders in respect of a debt due to them for calls, and to a small extent on his banking account. The Court of Review seemed to consider that the company could not, under the first act alone, sue out such a fiat, inasmuch as the debt was purely equitable; but they held that, coupling the apparent intention of the legislature in the former act, which expressly mentions petitions in bankruptcy with the more specific and stringent provisions in the latter, such a fiat was sustainable. Erskine, C. J., said, that in this case an objection had been taken to the petitioning creditor's debt, which objection had been founded on the fact that the fiat had been issued out by a company of which the bankrupt was a member, in respect of a debt due from him to the firm, and that unless the case came within the provisions

[1] 1 Mont. & Chit. 365. [2] 3 B. & C. 178; 5 D. & R. 24.

of the acts of Parliament authorizing the public officers of certain banking companies to sue on their behalf the members of their own firm, this objection would have been fatal, inasmuch as the debt being equitable only, there could be no action brought, and, consequently, no fiat sued out. "But," added his Honor, "by the 1 & 2 Vict., c. 96, amending the former act of 7 Geo. 4, c. 46, the legislature has thought it right to enact, 'that any person, now being or having been, or who may hereafter be or have been, a member of any copartnership now carrying on, or which may hereafter carry on, the business of banking under the provisions of the said recited act, may, at any time during the continuance of the same, in respect of any demand which such person may have, either solely or jointly with any other person, against the copartnership or the funds or property thereof,' sue and be sued by the public officer appointed under the recited acts. And it goes on to state, 'that the person, having been and being a member, shall be capable of proceeding against the copartnership by the public officer, and be liable to be proceeded against by or for the benefit of the copartnership by such public officer as aforesaid, by such proceedings, and with the same legal consequences as if such person had not been a member of the said copartnership.' Without referring then to the language of the 7th of Geo. 4, by the force of this statute (1 & 2 Vict., c. 96), coupled with the 4th section, which takes away any right of set-off which such member might have in respect of dividends of shares or profits of the concern, the public officer would have a right to bring an action, and it would necessarily follow, as it appears to me, that he might also petition for a fiat in bankruptcy, for though it has been objected that it has been decided in the case of Guthrie v. Fisk, that an act of Parliament authorizing a company to sue and be sued by their secretary, did not authorize that secretary to sue out a fiat in bankruptcy, yet that decision proceeded upon the language of that particular act of Parliament which expressly confined it to suing and being sued, and being a private act of Parliament, the court thought they were bound to construe it strictly, and that under its provisions the legislature had not intended to extend the power of the secretary to take proceedings in bankruptcy. But here the language is much more extensive. It refers not only to all proceedings in law or equity, but enacts that every member shall be liable to be proceeded against 'by such proceedings, and with the same legal consequences as if such person had not been a member of the said copartnership.' It appears to

me, therefore, that that would have removed the objection to the process in bankruptcy being taken out for the purpose of recovering a debt due to the firm. And then, looking back at the 7 Geo. 4, c. 46, s. 9, it is clear that the legislature intended that in all those cases where a partnership might sue, or might take out a commission of bankruptcy, the secretary or the registered officer should be the proper person to institute these proceedings. Therefore, whatever might have been the effect of this clause, taken by itself, before the passing of the recent statute of 1 & 2 Vict., it appears to me that, taking the two acts of Parliament together, the fiat was well sued out by the registered officer of the company against the bankrupt for a debt due to him from the firm."

It has been held that there is nothing in the stat. 7 Geo. 4, c. 46, which takes away the general right of a third person to sue out a fiat against any of the members, and consequently that a creditor of the company constituted under that act may sue out a fiat against any member of the company who commits an act of bankruptcy, and need not proceed in the first instance against the public officer of the company.[1]

By the 12th section of the 6 Geo. 4, c. 46, judgment against the public officer shall operate as judgments against the copartnership. And by the 13th section, execution may be issued against any member of the copartnership; and if that execution shall not be effectual for obtaining payment, execution may issue against any person or persons who was or were members of the copartnership at the time when the contract was entered into.

Where the act of Parliament which regulates a joint-stock company gives the public a right to sue any one of the directors as a nominal defendant to the action, execution cannot issue against that defendant personally unless the act contains express words to that effect, and this mode of construction will be strengthened if the act gives the creditor power to take the property which belongs to the company at the time of the execution, and not at the time of the contract, because this is an abridgement of a common-law right.[2]

Canal companies.

SEC. 894. The other leading statutable companies are canal companies and railway companies, but these are, generally speaking, incorporated, and, therefore, removed from the operation of the law of

[1] Ex parte Wood, 8 Jurist, 251; see *ante*, p. 766.

[2] Harrison v. Timmins, 4 Mees. & Wels. 510.

partnership. The acts, however, by which they are established not only invest them with the general right of suing which is incident to corporations, but contain special provisions for the mode of declaring and tendering evidence in actions for calls.

The general principles by which courts of law and equity are guided in dealing with controversies between these sorts of companies and the public are laid down by Lord Eldon in Blakemore v. Glamorganshire Canal Company.[1] His Lordship, in referring to the numerous acts of Parliament which had been applied for in these cases said: "I apprehend those who come for them to Parliament do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else." Hence it is that the Court of King's Bench will interfere by mandamus, and the Court of Chancery by injunction, the one to compel them to the performance of their undertakings, and the other to restrain them from the abuse of their privileges.

The jurisdiction by mandamus was lately exercised in the case of The Queen v. The Eastern Counties Railway Company.[2] There, it appeared that a company who had obtained an act of Parliament for making a railway from London to Norwich had only purchased land and commenced work on a part of the line (from London to Colchester), and it appeared doubtful, on the circumstances stated in the affidavit, whether they intended to proceed further than Colchester; a mandamus was accordingly granted, calling upon them to complete the whole line, to set out any proposed deviations from the original line, and to proceed to purchase lands on the remainder of the line pursuant to the provisions of the act.

The simple case of jurisdiction by injunction is where the company act in direct contravention of the provisions of their act of Parliament, as by taking land which is not *bona fide* required for the purpose sanctioned by the act.[3] But there is also a class of cases in which they have been restrained from infringing a private contract by means of which they have been enabled to obtain the extraordinary powers granted to them by the legislature. The case of Edwards v. The Grand Junction Railway Company[4] is a leading authority on the subject of injunctions against the breach of these parliamentary contracts. That case was decided on the principle that an agreement to withdraw or withhold opposition to a

[1] 1 Myl. & K. 162.
[2] 1 Nichol, Hare & Carrow, 509.
[3] Webb v. Manchester & Leeds Railway Co., 4 Myl. & Cr. 116.
[4] 1 Myl. & Cr. 650.

bill in Parliament is legal,[1] and that a court of equity will enforce a contract founded on such a consideration. It appeared that a person acting on behalf of the subscribers to a railway, who were then soliciting a bill in Parliament for the purpose of forming them into an incorporated joint-stock company, entered into a contract with the trustees of a road, whereby it was stipulated that, in consideration of the trustees' withdrawing their opposition in Parliament, and consenting to forego certain clauses of which they had intended to press for insertion in the act, a formal instrument to the effect of the clauses should be executed under the seal of the company when incorporated, and the bill was accordingly allowed to pass unopposed and without the clauses. The company, having obtained their act, refused to execute the deed, and were proceeding to carry on works at variance with the terms on which the opposition to the bill was withdrawn. Accordingly, Lord Cottenham, C., at the suit of the trustees, granted an injunction to restrain the company from violating the provisions contained in the omitted clauses of the act of Parliament.

In Doo v. The London & Croydon Railway Company,[2] the plaintiff was a lessee of premises held of the Croyden Canal Company for an unexpired term of nineteen years, subject to be determined on his receiving from the lessors six months' notice and two years' reserved rent. By an agreement between the railway company, the canal company, and the plaintiff and others, lessees, it was agreed that in consideration of the canal company and the lessees, withdrawing their opposition to a bill in Parliament establishing the railway company, the railway company should, in case they purchased any of the premises held by the lessees, purchase the same without prejudice to the lease, and that in case the railway company should apply to the lessees to purchase, or the lessees should give notice to the railway company of their desire to sell the premises held as aforesaid, the lessees should receive compensation for their interest and for damages. The plaintiff and other lessees withheld their opposition, and the railway company purchased the whole of the canal and premises. The plaintiff then gave notice to the railway company requiring them to purchase his leasehold interest, and claiming compensation. On the other hand, the railway company, tendering to the plaintiff two years' reserved rent, gave a counter notice to determine the tenancy at the end of six

[1] It was doubted whether such an agreement could be entered into by a Peer of Parliament, but it has lately been decided that it can. Lord Howden v. Simpson (in error), 1 Nich., Hare & Carrow, 347.

[2] Nichol, Hare & Carrow, 257.

months, at the expiration of which they brought an ejectment. The plaintiff having obtained the common injunction, in default of an answer to restrain the ejectment, Sir L. Shadwell, V. C., dissolved the injunction, but, on appeal, Lord Cottenham, C., discharged the order on the ground that the notice given by the plaintiff put the parties in the situation of vendor and purchaser, and that the company could not eject the plaintiff till they had paid the purchase-money.

Again, in Stanley v. The Chester & Birkenhead Railway Company,[1] the bill prayed that an agreement, which the plaintiff had entered into with one company, might be declared binding on another company under the following circumstances: Certain persons intended to form a railway from A to B, which was to pass over the plaintiff's estate. The plaintiff opposed the project, but on the agent for the projectors agreeing, in writing, to pay him 20,000*l.* for the portion of his estate over which the railway was to pass, he consented to withdraw his opposition. At the same time certain other persons intended to form a railway between the same *termini*, but by a different line, which also passed through the plaintiff's estate, but not through the same part of it as the former line. Fourteen acres of the plaintiff's land were required for the former railway, and sixteen for the latter. The plaintiff opposed the latter railway also. The agents for the rival projectors then entered into and signed an agreement (which was approved of and signed by the plaintiff's agent), by which they agreed that the first line should be abandoned and the second adopted, and that the adopted should take the engagements entered into with the land-owners by the abandoned line. The plaintiff thereupon withdrew his opposition to the adopted line, and the act of Parliament for making the second railway, and for incorporating the projectors of it was passed. The corporation having refused to pay the plaintiff any part of the 20,000*l.*, he filed his bill praying the declaration above mentioned for a specific performance of the agreement, and payment of the purchase-money, and for an injunction in the meantime to restrain the defendants from entering upon his lands. The defendants demurred to the bill, but both the Vice-Chancellor and the Lord Chancellor overruled the demurrer, being clearly of opinion that the plaintiff was entitled to the relief prayed for by the bill.

In giving judgment on this demurrer, Lord Chancellor Cottenham said that the case, as it appeared on the bill, was one of the grossest frauds he had ever seen attempted, and it is lamentable to observe,

[1] 9 Sim. 264; 3 Myl. & Cr. 773.

generally, that in cases of this nature as well as in matters of minor importance, the conduct of railway companies has been characterized by a profligate disregard of the plainest principles of justice:

> Dicere vix possis quam multi talia plorent,
> Et quot venales *injuria* fecerit agros.[1]

It is to be hoped, therefore, that the Court of Chancery will continue to watch with jealousy the proceedings of these societies. Few persons, it is apprehended, except those who are directly interested in such concerns, can fail to appreciate the spirit of the following observations of the Lord Chancellor: "The powers given to these companies are so large—it may be necessary for the benefit of the public—but they are so large, and so injurious to the interests of the individuals, that I think it is the duty of every court to keep them most strictly within those powers; and if there be any reasonable doubt as to the extent of their powers, they must go elsewhere[2] and get enlarged powers; but they will get none from me, by way of construction of their act of Parliament."[3]

We must, however, distinguish between cases where a parliamentary contract has *bona fide* been entered into, and cases where parties have merely refused their assent, or given a qualified assent to a bill in Parliament, but have not taken active steps, by opposing the bill or otherwise, to get the particular measure or qualification which they propose, carried into execution.[4] And it may also be noticed that parties who apply for injunctions against railway companies must have a substantial interest in the property in respect of which they seek the interference of the court.[5] And though every proprietor of lands taken by a railway company has a right to have the powers of the act of Parliament strictly and literally carried into effect as regards his own lands, and also a right to require that no variation shall be made to his prejudice, yet, where the act of Parliament is faithfully carried into execution as regards his lands, he cannot, on the mere ground of a variation which is not injurious to himself, and which was made with the consent of others, obtain from a court of equity an injunction to stay the proceedings of the company.[6]

---

[1] Juv. Sat. 14, 147.

[2] An incorporated company will not be restrained, even at the suit of a shareholder, from applying to the legislature to alter its constitution and object. Ware v. Grand Junction Water-Works Co., 2 Myl. & K. 470.

[3] 4 Myl. & Cr. 120.

[4] Aldred v. North Midland Railway Co., Nichol, Hare & Carrow, 414.

[5] Eton College v. Great Western Railway Co., Nichol, Hare & Carrow, 200.

[6] Lee v. Milner, 2 You. & C. 611.

Where a company is enabled but not compelled by an act of Parliament to carry for hire, it will be liable to the law of common carriers, notwithstanding that, by the company's act, twenty-four days' notice must be given of any action for any thing done or permitted to be done in pursuance of the act.[1]

[1] Palmer v. Grand Junction Railway Co., 4 Mees. & W. 749.

CHAPTER XXXIX.

OF THE BANKRUPTCY OF PARTNERS.

SEC. 895. Of the consequences of bankruptcy.
SEC. 896. Who are to be deemed bankrupts.
SEC. 897. Who are to proceed against.
SEC. 898. When fiat is void.
SEC. 899. What property passes to assignee.
SEC. 900. Administration under, joint and separate.
SEC. 901. Effect of an act of solvent partner.
SEC. 902. Powers of solvent partner.
SEC. 903. Effect of acts of bankrupt partner on dealings of firm.
SEC. 904. Effect of bankruptcy of one, on execution against firm.

Of the causes and consequences of the bankruptcy.

SEC. 895. All the partners in a firm may become bankrupt together, or some, or one only, may become bankrupt, while the others remain solvent.[1]

To constitute two or more partners bankrupts, there must be evidence of joint trading. But it is sufficient if a person is proved to have acknowledged himself partner with a trader, and to have given directions in the concern, though no act of buying or selling during the time of the partnership can be established.[2] And under peculiar circumstances a person may be considered in the light of a joint trader even after a dissolution; for, in one case,[3] a commission of bankrupt was sustained against a partnership on a debt contracted many years after dissolution, the sale of the partnership goods having been continued.

Who are to be deemed bankrupt.

SEC. 896. They only of the partners who have actually committed acts of bankruptcy are to be deemed bankrupts.[4] Where one of two

[1] Wats. Partn. 243.
[2] Parker v. Barker, 1 Brod. & Bing. 9.
[3] Tarlton v. Backhouse, 2 Swanst. 571; Ex parte Tarlton, 19 Ves. 404. But in this case, either the retiring partner could not have given legal notice of his retirement, or there must have been some outstanding debts of the partnership.
[4] Allan v. Hartley, 4 Doug. 20; Co. B. L. 9; Hogg v. Bridges, 2 Moore, 122.

partners in a bank, who alone resided at it, ordered it to be shut up, and absented himself from it, and the bank stopped payment, this was holden to be evidence of an act of bankruptcy by the resident partner only.[1] So, where one partner went abroad for the purpose of transacting his business, but not of avoiding his creditors, and the other partner contracted a debt in the partnership name and afterward committed an act of bankruptcy, and the clerk of the firm went to the partner abroad and communicated to him the insolvent state of the house, upon which the absentee partner said he should not return — this was held not to be a sufficient act of bankruptcy to support a joint commission, the court principally adverting to the difficulty of ascertaining the date of the act of bankruptcy.[2]

On the other hand, where two partners carried on business together, but under different names, and in different places, namely, at Manchester and London, and one partner resided at each place, and the London partner being on a visit for a few days at Manchester, occasionally attended the counting-house there, and both partners, afraid of an arrest, left the house privately and carried the account books with them, this was ruled to be an act of bankruptcy in both.[3] And where two traders in partnership left their shop, and told their shopman that they did so for the purpose of getting some bills discounted, and directed him to say they were not in the way, or to make some excuse for them in case a creditor should call, and a creditor did call on that and following day, when they were both at home, and desired to see the one or the other of them, and the shopman without further authority denied them, and they were afterward informed of the circumstance and did not object, it was held that the jury was warranted in concluding that they absented themselves from their shop with intent to delay their creditors.[4]

A conveyance by a firm of all their stock in trade, debts and effects, for the benefit of their creditors, though without the concurrence of every creditor, both joint and separate, is an act of bankruptcy by the firm.[5] So, a conveyance by partners of their property in trust for their creditors, with a proviso to be void if all the creditors for above 20*l.* should not execute it, or a commission of bankruptcy should

[1] Mills v. Bennett, 2 Man. & Selw. 556; Ex parte Mavor, 19 Ves. 543.
[2] Ex parte Mutrie, 5 Ves. 576.
[3] Spencer v. Billing, 3 Camp. 312.
[4] Capper v. Desanges, 3 Moore, 4; Deffle v. Desanges, 8 Taunt. 671; Ex parte Gardner, 1 Ves. & Beav. 77. A general order for denial, with other circumstances showing that a man begins to keep his house with intent to delay his creditors, is sufficient to make him a bankrupt, without any positive denial of a creditor. Harvey v. Ramsbottom, 1 Barn. & Cres. 55.
[5] Eckhardt v. Wilson, 8 T. R. 140.

issue within a certain time, is an act of bankruptcy;[1] but a conveyance for that purpose, where the deed is joint and not several, and one partner alone executes, is not an act of bankruptcy, even in that partner.[2]

Who may proceed against.

SEC. 897. When an entire firm has committed an act or acts of bankruptcy, any joint creditor having a legal, not an equitable, debt, to the amount of 100*l.*, may sue out a joint fiat against them. A separate creditor cannot sue out a joint fiat.[3] A creditor of the whole firm may, under the present law,[4] sue out a joint fiat against some of the members.[5] He may likewise sue out a separate fiat against any one of the partners of the firm indebted to him, who has committed an act of bankruptcy.[6] And where there is a major firm including a minor, the two firms carrying on distinct trades, a creditor of the minor firm may sustain a fiat against the minor firm only. At least it has been held that such a fiat is good at law, though it is not within the 16th section of the statute.[7]

It has been ruled that even a partner may sue out a fiat against his copartner, if his debt have not arisen from the partnership.[8] And it seems clear that, where the partnership has been dissolved, and the solvent partner has paid all the debts, he may sustain a fiat against his copartner.[9]

The right to a fiat is, in a qualified sense, a legal right, like that of an action; and as courts of justice have no concern with the motives of parties who assert a legal right, a fiat will be sustained, although one object of the petitioning creditor be to dissolve the partnership existing between the bankrupts, if it appear that he *bona fide* intends

---

[1] Dutton v. Morrison, 17 Ves. 200.

[2] Id.

[3] 6 Geo. 4, c. 16, s. 15; Arch. B. L. 274; Prosser v. Smith, Holt, 442.

[4] Overruling Streatfield v. Halliday, 5 T. R. 779; Ex parte Henderson, 4 Ves. 163, etc.

[5] By the 6 Geo. 4, c. 16, s. 16, any creditor or creditors whose debt or debts is or are sufficient to entitle him or them to petition for a commission against all the partners of any firm, may petition for a commission against one or more partners of such firm, and every commission issued upon such petition shall be valid, although it does not include all the partners of the firm.

[6] Crisp v. Perritt, Willes, 467; Smith v. Oriel, 1 East, 368.

[7] Ex parte Chambers, 2 Mont. & A. 440; Bernasconi v. Fairbrother, id. 241.

[8] Windham v. Paterson, 1 Stark. 144; Ex parte Notley, 1 Mont. & A. 46; Ex parte Gray, 2 M. & A. 283. But a fiat may be supported on a petitioning creditor's debt, which is composed partly of a partnership debt, if the remainder is in itself sufficient. Ex parte Richardson, 3 D. & C. 244. In West v. Skip, one partner sued out a commission against his copartner on a partnership debt.

[9] Ex parte Nokes, Montn. Partn. 62, App.; see Antram v. Chase, 15 East, 209.

to carry on the fiat.[1] But a fiat issued merely for the purpose of dissolving the partnership, or enforcing payment of a disputable partnership debt,[2] is supersedable.[3]

When the fiat is void.

SEC. 898. There are some cases in which, though a fiat against partners may be void at law, it will be recognized by the court of bankruptcy to this extent—that the court will either refuse to annul it, or, for the purpose of sustaining it, will go the length of removing out of the way a prior legal fiat.

Thus, at law, a fiat in bankruptcy issued against an infant, is not merely voidable, but void.[4] But where an infant partner has taken an active part in the business of his partnership, and has induced persons to give him credit as a party of full age, the court of bankruptcy will not annul the fiat in his behalf, but leave him to his remedy at law.[5] However, the mere circumstance that his name was used in the firm, is not a sufficient ground for dismissing his petition to have the fiat annulled.[6]

Again, notwithstanding that a joint fiat against partners, one of whom has been attainted of felony, may be void at law, yet it may be a question whether the court of bankruptcy would not permit the felon to be included in a joint fiat where complicated matters of account are involved.[7]

The cases in which the court will sustain a joint fiat, notwithstanding its invalidity at law, will be noticed in a subsequent chapter.

What property passes to assignee under joint bankruptcy.

SEC. 899. Under a joint bankruptcy, not only the joint but the separate property also passes to the assignee.[8] Under a joint commission against father (tenant for life) and son (tenant in tail), it was held that the assignee took an estate for the life of the father with a base fee in remainder, determinable on the failure of the estate tail.[9]

Under a separate bankruptcy, all the separate property, and such

---

[1] Ex parte Wilbran, 5 Madd. 1; Ex parte White, 2 M. & A. 114; Ex parte Parkes, 3 Dea. 81.
[2] Ex parte Hall, 3 Dea. 405.
[3] Ex parte Christie, Mont. & Bligh, 314.
[4] 9 Bing. 365; see Ex parte Addison, 3 Dea. 54.
[5] Ex parte Watson, 16 Ves. 265.
[6] Ex parte Lees, 1 Dea. 705.
[7] Ex parte Addison, *supra*.
[8] Ex parte Cook, 2 P. W. 500; Ex parte Baudier, 1 Atk. 98; Hague v. Rolleston, 4 Burr. 2174.
[9] Jervis v. Tayleur, 3 Barn. & Ald. 557.

part of the joint property as the bankrupt himself would be entitled to, passes to his assignees.[1]

Under a separate bankruptcy, the assignees become tenants in common with the solvent partners, or their representatives, and hold the bankrupt's undivided share of the partnership effects, from the time of the act of bankruptcy, subject to the rights of the solvent partners.[2]

The assignees under a separate bankruptcy have a right to the share, not only of the partnership effects remaining in specie, but of the profits of adventures outstanding at the time of the bankruptcy. They are likewise entitled to the outstanding installments due from the solvent partner for his admission into the partnership;[3] as, also, to a share of the profits of the trade carried on after the bankruptcy by the solvent partner, with the capital of the original partnership.[4] It has, however, been laid down by Lord Tenterden as a general principle of law, that if one partner becomes a bankrupt, his assignees can obtain no share of the partnership effects until they first satisfy all that is due from him to the partnership;[5] which opinion is in accordance with the general rule just stated, that they hold the bankrupt's share of the partnership effects subject to the rights of the solvent partners. Hence, where certain part-owners of ships were likewise engaged as partners in adventures, and the practice was to divide the produce of the adventure in shares, but no partner's share was delivered to him till his share of the disbursements was paid, upon the bankruptcy of one of the partners it was held that his assignees could not maintain trover against the other partners for his share of the produce of an adventure, till his share of the disbursements had been discharged.[6]

The assignees of a bankrupt partner are not in the situation of copartners with those who remain solvent, for the purposes of carry-

[1] Horsey's case, 3 P. Wms. 23; Eddie v. Davidson, Doug. 627; Bolton v. Puller, 1 Bos. & Pull. 539; Barker v. Goodair, 11 Ves. 85.

[2] West v. Skip, 1 Ves. 232; Fox v. Hanbury, Cowp. 445; Taylor v. Field, 4 Ves. 396; Smith v. Stokes, 1 East, 363; Smith v. Oriel, id.

[3] Akhurst v. Jackson, 1 Swanst. 85.

[4] It has been inferred, arguendo, that assignees filing a bill for an account of profits made by the solvent partners after the bankruptcy, render themselves personally liable for the losses. See 15 Ves. 221.

[5] 8 Barn. & Cres. 618; Goss v. Dufresnoy, Davies' B. L. 371.

[6] Holderness v. Shackels, 8 Barn. & Cres. 612; 3 Man. & Ry. 95. In this case it appeared that the bankrupt's share had been weighed out, and placed separately in the warehouse in casks marked with his initials. But Lord Tenterden observed that this was not an absolute appropriation of the cask and its contents to the bankrupt, but only a qualified appropriation, enabling him to take the goods, unless notice was given that his share of the disbursements had not been paid.

ing on the trade, though they may be considered as copartners for the purpose of winding up the concern. However, if no account be entered into immediately, and the solvent partners continue to trade with the capital of the original partnership (which is equivalent to the assignees continuing the trade with the solvent partners), it cannot be objected to a bill, brought by the assignees for a share of the profits of the continued business, that they did not, as soon as possible, call upon the solvent partners to account; for the obligation to settle the partnership accounts is not more imperative on the part of the assignees than upon the solvent partners.[1] And even with regard to trading by the assignees, Lord Eldon has said that the proposition would be rash, that there can be no case in which they could trade with the consent of the creditors, or of the creditors and the bankrupt together. If they had the consent of all persons interested, he did not think that other persons with whom they might deal could make the objection. The duty was not as between them and the other persons, who were not properly to be termed remaining or surviving partners; the destruction of one being, unless it was otherwise provided, a dissolution of the whole partnership.[2]

As the obligation implied among partners is that they are to use the joint property for the benefit of all whose property it is, and as the assignees of a bankrupt partner stand precisely in his situation, it is clear that when such a course is beneficial to a bankrupt's estate, and he has not been bound by stipulation, the assignees may insist upon a sale of the whole property.[3] But the assignees have no right to sell any part of the joint effects, where no necessity for the sale exists, and the solvent partners are able and willing to account for the share of the bankrupt partner, and to indemnify them against the joint creditors. Accordingly, upon a bill filed, and an affidavit at the instance of a solvent partner, to restrain the assignees of a bankrupt from selling the joint effects, an injunction has been allowed.[4]

The whole of the bankrupt's property vests in the assignees abso-

[1] 15 Ves. 228.
[2] 15 Ves. 227.
[3] Crawshay v. Collins, 15 Ves. 218; 2 Hov. Supp. 403.
[4] Allen v. Kilbre, 4 Madd. 464. In this case the bill contained no offer to pay the joint creditors, though it offered to account for the share of the bankrupt partner. *Ergo quære.* In *Ex parte Montgomery*, 1 Glyn & Jam. 338, which was an application by *creditors* to restrain the assignees from a sale of the bankrupt's effects, on the ground of suspicious circumstances in the intended mode of sale, Lord Eldon thought the court could not interfere, as the assignees acted at their own risk, and on their own responsibility, and they, and not the court, were to be the judges of the propriety and expediency of the sale. But see *Ex parte* Figes, 1 Glyn & Jam. 122.

lutely, so as to give them precisely the same rights and remedies, with relation to it, as if the property vested in them in their own right individually. They have the same remedies by action for the recovery of debts due to the bankrupt, and for all civil injuries with respect to property which has passed to them under the bankruptcy, that the bankrupt would have had, if no fiat had been sued out against him.[1] Hence, when the bankruptcy is separate, the solvent partners must join with the assignees in an action for the recovery of joint debts, or application must be made to the Lord Chancellor, under the 6 Geo. 4, c. 16, s. 89, for leave to prosecute the action in their names, jointly with those of the assignees.

Administration under, joint and separate.

SEC. 900. Under a joint bankruptcy, the administration of the bankrupt's estate, both joint and separate, takes place in the bankruptcy.[2] In the case of a separate commission, it was formerly the custom to administer the separate estate in the bankruptcy, and the joint estate in a suit in equity, instituted by the joint creditors against the assignees and solvent partners; but Lord Loughborough observed that the consequence of this rule was, that what he ordered one day sitting in Bankruptcy, he forbade the next day sitting in Chancery, it being quite of course to stop the dividend on the joint estate, upon a bill filed. His Lordship, accordingly, adverting to the needless expense of a Chancery suit in almost every case, altered the rule; and the result is, that, under a separate fiat of bankruptcy, the other partners remaining solvent, an account is directed of the joint estate (in the absence even of the other partners, when abroad), and the whole account is taken in the bankruptcy.[3]

It should be remarked, however, that there is an exception to this practice in the case of a mine.

With regard to the debts provable under a fiat against partners, little need be said as connected with the particular subject of partner-

[1] See Archb. B. L. 245. See *post*, chap. 3, sect. 4. If upon the dissolution of the partnership between two persons, solicitors of the bankrupt, it is agreed, that the remaining partner shall pay the partnership debts, and the assignees of the bankrupt, with notice of this agreement, continue to employ the remaining partner, the court of bankruptcy will not, on the application of the assignees, interfere to charge the retiring partner. Ex parte Gould, 2 Mont. & A. 48.

[2] Ord. Loughborough, 8th March. 1794.

[3] Ex parte Elton, 3 Ves. 242; Dutton v. Morrison, 17 id. 209; Barker v. Goodair, 11 id. 85; Ex parte Farlow, 1 Rose, 421. But in taking the account, the Court of Bankruptcy had not jurisdiction to order the solvent partner to deliver up the partnership books; Ex parte Finch, 1 D. & C. 274; though the assignees have a right to inspect them.

ship. It may be observed, however, that where one partner becomes a bankrupt, and is indebted to his copartner, the solvent partner must prove such debt under the fiat or it will be barred by the bankrupt's certificate.[1] For, by the 6 Geo. 4, c. 16, s. 52, "any person who, at the issuing of the commission (fiat), shall be surety or liable for any debt of the bankrupt, if he shall have paid the debt, or any part thereof, in discharge of the whole debt (although he may have paid the same after the commission issued), shall be entitled to prove his demand as a debt under the commission." On the construction of the statute in this respect, the case of Wood v. Dobson[2] was decided. Upon the dissolution of partnership between three partners, two of the three assigned to the other all their shares in the partnership debts and effects, and the other covenanted to pay all debts then due from the partnership, and to indemnify the two from the payment of the same, and from all actions and costs by reason of the non-payment of the same. The remaining partner became a bankrupt, and commission issued against him, under which he obtained his certificate. Afterward, the holder of a bill, accepted by the three partners, and due before the dissolution of the partnership, sued the two, and they were obliged to pay the bill. It was held that the certificate might be pleaded in discharge of an action brought by the two against the other, upon his covenant.

It may be deduced from the case of Wood v. Dodgson, what indeed has been decided by a subsequent case,[3] that the certificate under a separate bankruptcy is a bar to all actions for contribution by the bankrupt's copartners, and, generally, the certificate under a joint or separate bankruptcy discharges the bankrupt from all debts, both joint and separate.

A bankrupt partner's certificate is no bar to an action against his copartner, for, by the 6 Geo. 4, c. 16, s. 121, no such certificate shall release or discharge any person who was partner with such bankrupt at the time of his bankruptcy, who was then jointly bound, or had made any joint contract with such bankrupt.[4] In the same manner, signing the certificate of the surviving partner does not release the estate of the deceased partner.[5]

---

[1] But he cannot do so in competition with creditors. See *post*, chap. 2, sect. 9.

[2] 2 Man. & Sel. 195.

[3] Affialo v. Fourdrinier, 6 Bing. 306; 3 Moore & P. 743.

[4] Horsey's case, 3 P. Wms. 23; Ex parte Yale, id. 24, n.; Twiss v. Massey, 1 Atk. 67; Howard v. Poole, Davies, 451. 2 Str. 995; Wickes v. Strahan, 2 Str. 1143. But see 2 Man. & Sel. 26.

[5] 6 Geo. 4, c. 16, s. 121; Ex parte Bolton, Buck, 13; Heath v. Hall, 4 Taunt. 326.

[6] Sleech's case, 1 Mer. 570. See Browne v. Carr, 7 Bing. 508.

Effect of, on acts of solvent partner.

SEC. 901. We shall now proceed to make a few observations on the effect of the bankruptcy of one partner on the dealings of the firm. And first, as to its effect upon the acts of the *solvent* partner.

The acts of a *solvent* partner *bona fide*, and for a valuable consideration, have been at all times held valid, notwithstanding a previous secret act of bankruptcy committed by his copartner. On this principle, it was held in Fox v. Hanbury,[1] that consignments made by a solvent partner, after a secret act of bankruptcy committed by his copartner, for moneys advanced to the firm by the consignee, were good, supposing such consignments to have been made without the least color or mixture of fraud. In delivering the judgment of the court in this case, Lord Mansfield said that though the statutes then relating to bankrupts made an entire, not a partial, avoidance of the bankrupt's acts, as well in respect of his partner's moiety as his own, yet no case had been cited where a secret act of bankruptcy by one partner had been held to avoid an honest conveyance of partnership effects by the other. Each had a power, singly, to dispose of the whole of the partnership effects.

In more modern cases it has been held that the solvent partner, even with notice of an act of bankruptcy committed by his copartner, may satisfy the partnership creditor out of the joint funds in his hands, provided the claim were consummate at the time of the bankruptcy. For in this case the solvent partner is in the situation of one winding up the partnership affairs. In Harvey v. Crickett,[2] one of the partners, bankers, having become bankrupt, the defendants, who were holders of their notes, obtained part payment of them out of the funds of the partners which were in the hands of their London agents. For the remainder of the debt, the defendants took from the solvent partner who had full notice of the bankruptcy, and had communicated that fact to the defendants, a bill drawn by W, a debtor of the firm, upon third persons payable to the solvent partner, or order, and by him indorsed and delivered to the defendants. The solvent partner having afterward become bankrupt, the assignees under a joint commission against the two brought their action against the defendants for the proceeds of the notes paid off, and of the bill, but the plaintiffs failed in their suit. Lord Ellenborough said that for future purposes the bankruptcy of one partner might operate as a dissolution, so as to prevent the solvent partner

[1] Cowp. 445. See De Tastet v. Carroll, 1 Stark. 85.

[2] 5 Man. & Sel. 336.

from dealing with the partnership property as if it continued, but most certainly he had a lien on the joint funds in his hands, in respect of all claims which were consummate at the time of the bankruptcy. In this case the solvent partner had applied part of those proceeds in satisfaction of such a claim, and to take the money out of his hands, or those of the defendants, might be to his prejudice before the account was taken between the partners. Bayley, J., likewise observed that if this action was maintainable, the consequence would be that after an act of bankruptcy committed by one partner, the partnership house must immediately be closed. "If," said the learned judge, several persons enter into partnership, either for a definite or an indefinite time, each partner is at liberty to apply the joint funds in payment of the partnership debts, and each has a lien on those funds for his own indemnity limited to their being applied to the payment of partnership debts. When one of several partners becomes bankrupt, he puts himself by that act out of the partnership, and ceases to have any further control over the partnership property, the whole of his rights pass to his assignees. But this does not prevent the remaining partners from exercising the control which rests with them over the partnership property, to take care that it is duly applied in liquidation of the partnership debts." Abbott, J., likewise observed that if a solvent partner is not at liberty, after the bankruptcy of one partner, to apply the partnership funds to the discharge of partnership debts, he may be ruined in the midst of abundance of property capable of paying all the debts, and the creditors also must wait until such time as assignees are chosen, and it is their pleasure to make distribution.

The case of Harvey v. Crickett has been recognized and confirmed by more recent cases. In that of Woodbridge v. Swann,[1] one of two partners having become bankrupt, the solvent partner, thinking the firm capable of paying its debts, continued the business and paid partnership money into a banker's to be applied in discharge of running bills of the firm, payable at the bank. Afterward the solvent partner became bankrupt, and his assignees, together with those of the other partner, brought an action of assumpsit against the bankers to recover the money so paid. In support of this action it was contended that the case of Harvey v. Crickett had been in effect overruled by Wait's case, in which Lord Eldon decided that joint creditors who had taken joint effects in execution subsequent to an act of bankruptcy committed by one of the partners, could not retain those effects against the

[1] 4 B. & Ad. 623, and see Ex parte Robinson, 1 Mont. & Ayr. 18, *infra*, p. 585.

assignees under a separate commission. But the Court of King's Bench, per Denman, C. J., overruled this argument and decided in favor of the defendants, at the same time expressing an opinion that that authority of Harvey v. Crickett, and that class of cases, was left untouched by Lord Eldon's judgment *in re* Wait, and upon reference to the last-mentioned case it will be seen that it depended on artificial considerations which seem inapplicable to Harvey v. Crickett.

In the case of Smith v. Oriel,[1] which long preceded that of Harvey v. Crickett, the creditor of a firm was allowed to retain against the assignees of a bankrupt partner goods which had been delivered to him by the solvent partner in discharge of the debt, after the bankruptcy of the copartner. Even there, as Abbott, J., observed, it is not stated negatively that the solvent partner had not notice, on the contrary it is rather to be inferred that he had, as the case states that the commission against the bankrupt partner had issued before the transfer was made. But it seems clear that the solvent partner's knowledge of the fact makes no difference; the legal right cannot result from the absence of knowledge.

Neither can notice to the creditor of the bankruptcy of one partner affect transactions of this nature, where it is clear that no fraudulent preference was intended. In Harvey v. Crickett, one of the partners became bankrupt on the 17th May. Before the 22nd the defendants had notice that a considerable number of the bankrupt's notes had been refused payment, and on that day they were informed by a son of K, the solvent partner, that H, the other partner, had absconded, but that his father was perfectly solvent, unless transactions of which he was ignorant came to light. The arrangement respecting the bill[2] was entered into on the same day, and K's son, who acted for him on this occasion, dictated the form of the bill. But the reason for making it payable to K alone was, because he thought that every thing devolved on him upon H's absconding. Upon these facts the judges held that there was a *bona fide* payment, and no fraud; Abbott, J., said that if this power had been exercised with a view of giving a fraudulent preference it would have led to a different conclusion; but fraud was not stated and could not be intended. As far as any intendment could be made, he should infer the contrary, for it seemed that K, supposing he was of ability to discharge all the partnership debts, went on as long as he could, until he found his hopes disappointed. And Holroyd, J., observed, that it was not

[1] 1 East, 368. [2] 5 M. & S. 333.

in the contemplation of K, or of the defendants, that K would become a bankrupt, which would have been a material fact to distinguish this from the other cases.

And in Ex parte Robinson,[1] which was decided in a great measure on the authority of Harvey v. Crickett, both the creditor and the solvent partner had knowledge of the bankruptcy of the copartner. There the creditor, who was under acceptances for the firm of H & W, as a security for their acceptances, drew three bills of exchange on the firm, which were accepted by W, the solvent partner, and delivered by him to the creditor, who indorsed them over for value to a person who had no notice of the bankruptcy. Upon the subsequent bankruptcy of the solvent partner, the indorsee petitioned for liberty to prove against the joint estate, and Lord Brougham, C., allowed the proof. Now in this case it was not absolutely necessary to adopt the decision in Harvey v. Crickett, because the indorsee, under the circumstances before stated, had a title of his own, independent of that of the creditor,[2] but Lord Brougham said that the principles of Harvey v. Crickett stood unshaken by any subsequent decision, and that they were applicable to the case before him.

But if there be reasonable evidence of fraudulent preference, the creditor will not be permitted to avail himself of partnership property transferred to him by the solvent partner after the bankruptcy of the copartner. In another case,[3] which arose out of the bankruptcy of Harvey & Co., the court were of opinion that there was sufficient evidence to show that if the creditors were not clearly and distinctly cognizant of the fact of the bankruptcy of H, they had very strong reason to suspect his insolvency, which they said was quite sufficient to put the case of the creditors out of court. Probably, under the circumstances, it might be presumed that the creditors had notice of the falling state of the house altogether.[4] The facts of that case were shortly as follows:— H & Co. were partners as bankers in the country, and R & Co. were their London agents. H drew a bill upon the defendant D for a valid consideration, which was duly accepted. The bill, having been placed with R & Co., got back into the hands of H & Co. without being negotiated by the London bankers. H & Co. applied to R & Co. for advances, which application was agreed to, but a security required. H & Co. were prepared to give securities, amongst

[1] 1 Mont. & Ayrt. 18; overruling Ex parte Ellis, Mont. & B. 249.
[2] See Lacy v. Woolcott, *ante*.
[3] Ramsbottom v. Duck, 1 Mont. Part. 135, App., where see a valuable note on this subject (2 M.).
[4] See Biggs v. Fellows, 8 Barn. & Cres. 402; 2 Man. & Ryl. 450.

which was the bill in question. On the 17th May, which was subsequent to the proposition for an advance, but before the deposit of the bill, H committed an act of bankruptcy. On the 23d May, the bill was deposited with R & Co. as a security for the advances they had made. A separate commission of bankruptcy issued against H ; R & Co. then brought their action as indorsees against the defendant, but were nonsuited ; and a motion to set aside the nonsuit and for a new trial was refused.

In the case just stated, the court relied much upon the circumstances of the knowledge of R & Co. of the bankruptcy of H ; observing that their decision against the motion did not preclude the party from another action, and submitting the evidence of the party's ignorance of the bankruptcy of H to another jury, but that it was too much to say that the plaintiffs were not acquainted with the bankruptcy of H on 23d May. It seems clear, however, that, though the creditor's knowledge of the bankruptcy of one partner may go far toward establishing a fraudulent preference in contemplation of the bankruptcy of the other, it is by no means conclusive of that fact.

It is to be observed that, when the solvent partner disposes of the partnership effects after the bankruptcy of his copartner, he conveys the entire interest of all the *quondam* partners therein, and not his own interest merely. For, upon the principle that the partnership remains for the purpose of winding up the concern, the *jus disponendi* of the solvent partner cannot be affected by bankruptcy of his copartner. Therefore, if one of two partners become bankrupt, his assignees cannot recover a moiety of the moneys paid by the solvent partner on the partnership account, after the bankruptcy.[1]

Powers of solvent partner.

SEC. 902. But the power vested in the solvent partner under the circumstances, and for the purposes just stated, does not give him any right, after the bankruptcy of his copartner, to dispose of the partnership property by deed, or to negotiate bills and notes in the name of the firm. The execution of both partners being necessary to a deed, it follows that, if both join in a deed after the bankruptcy of one, the deed, subject to the provisions of the 2 & 3 Vict., c. 29, is good only for a moiety.[2] It has even been held that the mere deposit

[1] Harvey v. Crickett, 5 Man. & Sel. 336 ; Smith v. Oriel, 1 East, 368.

[2] Shep. Touch. 71.

of a lease as a security for a debt after the bankruptcy of one partner is good only for a moiety, the other moiety being vested in the assignees of the bankrupt partner.[1] With regard, also, to bills of exchange, they cannot, after the bankruptcy of one partner, be negotiated by the solvent partner in name of the firm. Thus, if a partnership bill, existing at the time of the bankruptcy, be afterward put into circulation, it must be indorsed, not by the solvent partner alone, but by him jointly with the assignees of the bankrupt.[2] So, if the solvent partner draw a bill in the partnership name after the bankruptcy of his copartner, in an action against the acceptor, the indorsees cannot declare on it as the bill of the firm, but as the separate bill of the solvent partner.[3] And, when a bill is delivered to two partners for the special purpose of being discounted, and, after the bankruptcy of one, is indorsed over by the other partner to the bankers of the firm, in liquidation of advances made to the firm, it seems doubtful whether the bankers, though without notice of the original trust, can maintain an action on such a bill against a person who so delivered it to the partnership. "In such a case," said Lord Ellenborough, "the question is whether a party, without a knowledge of the trust, has acquired interest beyond that of the trustee." In the case where this question arose, the plaintiffs were allowed to recover, with liberty to the defendants to argue the point, but no motion for that purpose was made.[4]

And although, with the exceptions just stated, it appears to be competent for the solvent partner, after the bankruptcy of his copartner, to dispose *bona fide* of the partnership effects, because, in so doing, he may be considered, to a certain extent, as aiding in the administration of such effects, yet, on the other hand, as in such case the whole account is taken in the bankruptcy, and the joint estate applied as if all had become bankrupts, and, as both in bankruptcy and in the administration of assets, the court has done more upon principles of convenience than as standing upon legal reasoning,[5] it seems to follow that the solvent partner might be enjoined from such proceedings if the same were injurious to the assignees, in the same manner as it had been decided that the assignees may be enjoined from the sale of the effects where the sale is injurious to the solvent partner, and the latter will account for the bankrupt's share.

---

[1] Whitwell v. Thompson, 1 Esp. 70. *Sed qu.;* and see Mont. Partn. 134. notes.

[2] Abel v. Sutton, 3 Esp. 108.

[3] Ramsbottom v. Lewis, 1 Camp. 179.

[4] Ramsbottom v. Cator, 1 Stark. 228.

[5] 17 Ves. 211.

Effect of acts of bankrupt partner on dealings of firm.

SEC. 903. It now remains to consider the effect of the acts of the bankrupt partner on the dealings of the firm. The general rule is, that if one of several partners commit an act of bankruptcy, though it will not prevent the solvent partner from disposing of partnership property *bona fide* for partnership debts, yet it is a dissolution of partnership as between the solvent and bankrupt partners, and destroys the agency of the bankrupt partner, and, therefore, no disposition of partnership property by the bankrupt partner can be binding.[1] That was decided in the case of Thomason v. Frere,[2] in which it was held that two partners, who had committed acts of bankruptcy, could not, by indorsement of a bill of exchange belonging to the partnership, bind their own assignees or the partner who had remained solvent.

Formerly, all the acts of the bankrupt partner were avoided, from the day of his bankruptcy, by virtue of the relation in the statutes.[3] But, by the 2 & 3 Vict., c. 29, s. 1, all contracts, dealings and transactions, by and with any bankrupt, really and *bona fide* entered into before the date and issuing of the fiat against him, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person or persons so dealing with such bankrupt had not, at the time of such contract, dealing, or transaction, notice of any prior act of bankruptcy by him committed. This enactment is intended to enlarge the provisions of the stat. 6 Geo. 4, c. 16, s. 81, and 2 Vict., c. 11, s. 12, which refer more especially to conveyances by bankrupts. It is clear, therefore, that conveyances by bankrupts are within the scope of the new enactment.

By stat. 6 Geo. 4, c. 15, s. 82, all payments[4] really and *bona fide* made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment

[1] Per Bagley, B., 1 Crom. & Mee. 529.

[2] 10 East, 418; and see Burt v. Moult, 1 Cr. & M. 525.

[3] Per Lord Mansfield, Fox v. Hanbury, Cowp. 445. The relation to the act of bankruptcy was confined to an act subsequent to the petitioning creditor's debt. Ex parte Birkett, 2 Rose, 71.

[4] As the payment must be *bona fide*, a payment in any mercantile dealings out of the ordinary course of trade would not satisfy the terms of the act; as, for instance, a payment for goods before they are delivered. See Deac. B. L. 676; Bishop v. Crawshay, 3 Barn. & Cres. 415.

by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed.

It was contended in Craven v. Edmonson,[1] that under this 82nd section of the bankrupt act, payment of a partnership debt by one of two partners after his bankruptcy, but before the bankruptcy of his copartners, was good, although the creditor had notice of the act of bankruptcy. The grounds of the argument were, that the payment having been made to the creditor for a debt due from both the bankrupts, the notice of an act of bankruptcy, in order to invalidate the payment, ought to be notice of an act committed by both such bankrupts; moreover, that the payment, although made by the bankrupt partner, was made by him as agent for the solvent partner. But the court held clearly that such payments were not protected by the statute, and that the bankruptcy of one partner destroyed his agency for his copartner.

In some cases, however, with a view to the protection of innocent third persons, the agency of the bankrupt partner has been held not to be destroyed by his bankruptcy.[2]

Effect of bankruptcy of one on execution against firm.

SEC. 904. How far an act of bankruptcy committed by one partner shall affect an execution subsequently issued against the partnership effects is a question which seems to require express decision. By the stat. 2 & 3 Vict., c. 29, which enlarges the prior enactment of 6 Geo. 4, c. 16, s. 81, all executions against the lands and tenements, goods and chattels of a bankrupt, *bona fide* executed or levied before the date and issuing of the fiat, are to be deemed valid, notwithstanding a prior act of bankruptcy, provided the person at whose suit such execution shall have issued had no notice of the act of bankruptcy at the time of executing or levying the execution. This enactment, though it clearly embraces executions against the partnership effects, where all the partners have committed acts of bankruptcy, does not seem to meet the objections raised by Lord Eldon to the validity of joint executions after the bankruptcy of one partner. Lord Eldon has held clearly, that where there is a bankrupt and a solvent partner, it is not competent for execution creditors to disappoint the arrangement made in bankruptcy for the equal distribution of the partnership property.[3] And

[1] 6 Bing. 734; 4 Moore & P. 622; see Dickson v. Cass, 1 Barn. & Adol. 343; Ex parte M'Gae, *ante*.

[2] Lacy v. Woolcott, *ante*.

[3] 3 Mer. 288.

the grounds for this opinion appear to have been, that an execution levied on the partnership effects is overreached even at law by a previous act of bankruptcy committed by one partner. Therefore, where a bill was filed by the assignees of a bankrupt partner, for an injunction against a joint creditor, who had, after the bankruptcy, though before the commission, attached the partnership goods in the Lord Mayor's Court, and obtained judgment on the attachment, Lord Eldon granted the injunction, upon the principle that a separate commission severs the joint tenancy, and vests the bankrupt partner's share of the joint property in the assignees, by relation to the act of bankruptcy; and that the action and attachment in the case before him were at variance with that principle, the issue averring the effects to be the joint property of the partners.[1]

So, in a subsequent case, in which a similar order was made,[2] Lord Eldon is reported to have said, that if, after an execution against one partner, a commission of bankrupt issues against him upon an act of bankruptcy antecedent to the execution executed, whatever may have been taken under the execution, becomes by relation the property of his assignees, to be applied among all the joint creditors, exactly as the application is made in bankruptcy. And in a still later case Lord Eldon acted upon this opinion, holding that joint creditors, who had taken joint effects in execution after an act of bankruptcy by one of the partners, could not retain them against the assignees under a separate commission afterward issued by another joint creditor against that partner.[3]

The judgment of Lord Eldon in these cases is certainly in accordance with the strict legal principles, that upon a commission of bankrupt issuing against one partner the interest of the bankrupt ceases, and the solvent partners become tenants in common with the assignees of the partnership effects, by relation to the act of bankruptcy; and, therefore, that an execution levied against the effects of the partners, after such bankruptcy, is void. But, perhaps, it may be

[1] Barker v. Goodair, 11 Ves. 78.

[2] Dutton v. Morrison, 17 Ves. 193. In one part of his judgment, in this case, Lord Eldon seems to lay some stress upon the circumstance of the commission being "of even date with the verdicts;" and in another part he says, "the question is, what is the effect of the commission, the attachments, under which verdicts of even date were obtained, and the preceding act of bankruptcy." It might be inferred from these expressions that he thought if the commission had not issued until after the return of the verdict, the execution would have been available. But, in the very same judgment, he says, "there was no actual execution under the attachments at the time the commission issued, and if there had been, it was immaterial;" and the latter *dictum* is confirmed by his decision in Wait's case, 1 Johns. (English) 605.

[3] *In re* Wait, 1 Jac. & Walk. 605.

doubted whether this state of the law is consonant with strict justice. It seems to bear hard upon a creditor who has used due diligence, and has without fraud obtained execution for his debt. It may here be remarked, that in Bristow v. Potts,[1] Lord Loughborough held an opinion directly at variance with Lord Eldon, and decided that the assignees of one of two joint debtors had no equity to obtain an injunction against creditors who had attached the joint estate. It must be admitted, however, with reference to the principles just stated, that Lord Loughborough's conclusion, in effect that the creditors of the two debtors should have execution against what was no longer partnership property, was, to use Lord Eldon's words, "a difficult conclusion."

The obstacles which arise to a joint creditor bringing a joint action, after an act of bankruptcy by one of the joint debtors, will not be remedied by his taking out a separate execution against the solvent partner, unless execution be levied against that partner's separate estate. If he levy execution upon the joint estate, taking what he conceives to be the solvent partner's share, he can only hold it subject to all the partnership dealings.[2] And it is clear that a joint creditor bringing an action against three persons in partnership, after an act of bankruptcy committed by one, cannot take out execution against the property of the two remaining partners. "Admitting," said Lord Eldon, "that he could, what is it that he can take? Is it more than what will appear to be property of the two, after an account of the estate of the three, and the joint demands upon them?"[3]

It is necessary to notice in this place the case of Brickwood v. Miller,[4] in which a joint creditor, who had attached partnership property in the West Indies, after an act of bankruptcy committed by one of the partners, was held entitled to retain what he had attached, to the extent of satisfying his joint debts, and liable to account only for the overplus. In the course of his elaborate judgment of this case, Sir William Grant seems to throw some doubt on the decisions in Barker v. Goodair, and Dutton v. Morrison; but he rests his judgment on the fact that the partnership in the principal case was in the West Indies; and he argued that it was impossible to tell a creditor that, because he happened to reside in England, and his debt had been contracted there, he should not be allowed to take

[1] 11 Ves. 81, note 2
[2] Ex parte Ruffin, 6 Ves. 119; West v. Skip, 1 id. 240.
[3] 17 Ves. 211.
[4] 3 Mer. 279.

such remedies against his foreign debtor as the law of their country might permit.

Upon the whole, with the exception of particular cases, as that of Brickwood v. Miller, there seems ground to contend, on the authority of the cases before Lord Eldon, that when one partner becomes a bankrupt, and a separate fiat issues against him, the Lord Chancellor may, on strict legal grounds, annul any execution which has been levied on the partnership effects, after the act of bankruptcy committed. On the other hand, when execution is levied against the partnership effects, and afterward a joint fiat issues against the whole firm, it seems clear that the extent and validity of such execution must be the same as in cases where there is no partnership;[1] and will be regulated by the stat. 2 & 3 Vict., c. 29, the provisions of which have been already noticed.

We ought not to conclude this chapter without observing that, until a man has actually become a bankrupt, and a fiat has been taken out against him, he may sue his debtors. Therefore, before the 6 Geo. 4, c. 16, there was some peril in paying a man who was known to be insolvent, though not a bankrupt. For instance, in Prickett v. Down,[2] two partners stopped payment, and a commission of bankruptcy issued against one. It was held that a debtor of the firm, who knew of the stoppage, could not refuse to pay his debt on the ground that the other partner might have committed an act of bankruptcy, in which case his assignees might call upon the debtor to account for the money a second time.

But now, by the 6 Geo. 4, c. 16, s. 82, all payments[3] to a bankrupt are protected, provided the debtor had not, at the time of such payment, notice of any act of bankruptcy by such bankrupt committed. The protection, therefore, to the debtor ceases only after notice of his creditor's bankruptcy. In this case, if the bankrupt, before a fiat issued, require payment of his debt, it will be prudent for the debtor to wait till he is compelled by suit to discharge it. For payments enforced by coercion of law are valid against the assignees, in case a fiat be afterward sued out.[4]

---

[1] But see the judgment In re Wait, 1 Jac. & Walk. 610.

[2] 3 Camp. 131.

[3] This enactment is now extended to all contracts, dealings and transactions by and with any bankrupt. See 2 & 3 Vict., c. 29.

[4] Eden, B. L. 266; Mont. Partn. 248

CHAPTER XL.

OF THE ADMINISTRATION IN BANKRUPTCY.

SEC. 905. Of joint and separate estate.
SEC. 906. What is joint estate in bankruptcy.
SEC. 907. Ostensible partners.
SEC. 908. Dormant partners.
SEC. 909. What is separate estate in bankruptcy.
SEC. 910. When separate, is joint estate in bankruptcy.
SEC. 911. Joint estate converted into separate.
SEC. 912. How joint estate may be converted into separate.
SEC. 913. What is essential to make conversion complete.
SEC. 914. All the terms of the contract must be complied with.
SEC. 915. When conversion may be defeated.
SEC. 916. Conversion not defeated by knowledge of the firm that it was insolvent.
SEC. 917. Creditors cannot prevent conversion.

Of joint and separate estate.

SEC. 905. In the words of Eyre, C. J., "If all the partners become bankrupts, all the joint and all the separate property will vest in the assignees whether the commissions are joint or several. If a separate commission issue against one partner, his assignees will take all his separate property, and all his interest in the joint property; if a joint commission issue against all, the assignees will take all the joint property, and all the separate property of each individual partner."[1] Now, as the rule of distribution in bankruptcy is this, "that the joint estate shall be applied to the joint debts, the separate to the separate debts, and the surplus of each reciprocally to the creditors remaining on the other,"[2] it will be of the utmost importance to consider what is joint and what separate estate.

Joint estate is that in which the partners are jointly interested for the purposes of the partnership, at the time of the bankruptcy.

[1] Bolton v. Puller, 1 Bos. & Pull. 539. [2] Per Lord Loughborough, Ex parte Elton, 3 Ves. 242.

Separate estate is that in which the partners are each separately interested at the time of the bankruptcy.

It is not unusual to confine the term "separate estate" to that part of a partner's property which is unconnected with the partnership. But it may be applied to property used for the purposes of a partnership, if belonging to one or more partners, to the exclusion of the rest.[1] We propose to use the term "separate property" in this more extended sense.

The partners may, by their articles, agree as to what shall be joint and what separate estate. So they may during the continuance of the partnership convert joint into separate estate and *vice versa*. Therefore, the original agreements, or the subsequent acts of the partners during the partnership, provided they be *bona fide*, and so far as they are not controlled by the statute of bankrupts, will be regarded in the distribution of the partnership assets under the bankruptcy, for these reasons:

What is joint estate in bankruptcy.

SEC. 906. Whatever was made joint estate by the agreement of the partners is joint estate under the bankruptcy.

Hence, where a partnership is dissolved and one of the partners is left in possession of the partnership stock for the purpose, not of carrying on the trade, but of paying the debts and winding up the concerns of the partnership, as the partnership continues for this particular purpose, it follows that, if the remaining partner become bankrupt, the stock so remaining in his hands is still the joint property of the partnership and distributable accordingly.

Nor will the distribution in this particular case be in any manner affected by that section of the statute of bankrupts, which enacts that goods which, by consent of the true owner, are in the order and disposition of the bankrupt as the reputed owner thereof, at the time of his bankruptcy, shall be distributable among his creditors.[2] The reason is that the remaining partner is in the situation of trustee for the continuing partner, and it has long been settled, that property

[1] See Ex parte Hamper, 17 Ves. 404.

[2] By stat. 6 Geo. 4, c. 16, s. 72, it is enacted "that if any bankrupt at the time he becomes bankrupt, shall, by consent and permission of the true owner thereof, have in his possession, order or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission provided that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel," etc.

held by the bankrupt in trust is not within the act.[1] "A mere dissolution," observed Lord Eldon, "does no more than declare that the partnership is not to be carried on any further, except for winding up the affairs, and he who has actual possession has it clothed with a trust for the other, to apply the property to the debts; and that will qualify the nature of his possession, so that it cannot be said he has the sole possession of the specific effects or the debts, to bring it within the operation of the statute."[2]

However, in a late case, where one of four partners died, and the surviving partners compromised and obtained securities for a debt due to the original firm, and became bankrupt, it was held that the securities were, by reputed ownership, distributable amongst the creditors of the three.[3]

Ostensible partners.

SEC. 907. An ostensible partner, retiring from a firm, and wishing to avoid the consequences of conversion which may possibly arise from leaving the partnership property in the hands of the remaining partner, ought to assign by deed the partnership effects either to the remaining partner, or to some other trustee, upon trust, to pay and satisfy the outstanding debts of the partnership, and to pay over the remainder to the partners, according to their respective shares; and he should, of course, take care that the dissolution of the partnership is properly notified in the Gazette, and, for his further security, it should be stated in such notice that the remaining partners undertake to pay the debts and wind up the affairs of the partnership.

Dormant partners.

SEC. 908. A dormant partner retiring from the firm is subject to greater difficulties. As "the object of the statute is to remedy the mischief arising from a trader holding out a delusive responsibility to the world, by appearing to be possessed of a stock in trade, or of other valuable articles, which are the subjects of sale and immediate transfer,"[4] it seems to follow that the trust which is exercised by a

[1] Winch v. Keely, 1 T. R. 619; Copeman v. Gallant, 1 P. Wms. 314; Ex parte Flyn, 1 Atk. 185. See Howard v. Jemmett, 3 Burr. 1368; Ex parte Martin, 19 Ves. 491; Ex parte Bacon, 3 Madd. 28; Ex parte Copeland, 2 Mont. & A. 177. But this does not apply to an unlawful trust; as, where by the rules of a company no person could hold more than two shares, and the bankrupt was trustee of two shares for a person who already had his full number; in which case it was held that the shares in the hands of the bankrupt passed to his assignees. Ex parte Watkins, 2 Mont. & A. 346; S. C., (nom. Ex parte Burbridge), 1 Dea. 131.

[2] 11 Ves. 6.

[3] Ex parte Taylor, Mont. 240.

[4] Deacon's Bankrupt Laws, Vol. 1, p. 403.

remaining partner over the partnership effects ought to be notorious to the world, in order to take the case out of the operation of the statute. Accordingly, if, upon the dissolution of a dormant partnership, the joint property be left in the possession, order, and disposition of the ostensible partner, upon the bankruptcy of the latter the whole, including the dormant partner's share, will pass to his assignees. Therefore, where A and B were partners, but the whole of the business was carried on by and in the name of A, B never appearing to the world as a partner, and at the dissolution of the partnership by effluxion of time, all the partnership stock and effects, by agreement between them, were left in A's hands, who was to receive and pay all the debts due to and from the concern, and to repay by installments the capital brought in by B, A having continued to carry on the business as before for a year and half, when he became bankrupt, it was held that all the partnership property and effects so left in A's hands, and also the debts due to the concern, passed to his assignees, being in the order and disposition of the bankrupt, as reputed owner, within the intent and meaning of the statute.[1]

In the case of Ex parte Enderby, just cited, although it was understood between the parties that A was to pay the partnership debts, yet no express assignment was made of the partnership stock and effects upon special trust for that purpose. Suppose, therefore, B to be a dormant partner with A, and that, previously to his retirement, B *bona fide* assigns all his interest in the partnership stock and effects to A, upon trust, to pay all the partnership debts, and subject thereto, upon trust, to repay B his share of the residue — that, on the day of B's retirement, there is enough joint property to pay the partnership debts, and that, within a month after B's retirement, A becomes a bankrupt — would the share of B, so assigned upon special trust, pass to the assignees of A? It seems, notwithstanding the severity of the doctrine as it affects B, that the question must be answered in the affirmative. For, in the case supposed, the danger is that the bankrupt may contract *separate* debts on the credit of the partnership, which, without the aid of the statute, would be left unpaid.[2]

This point, to be sure, was scarcely settled by the overruling[4] of the case of Caldwell v. Gregory, which had been decided in favor of the dormant partner, because there the trust did not extend over the

[1] Ex parte Enderby, 2 Barn. & Cres. 389; 3 Dowl. & Ryl. 636.

[2] See Ex parte Dyster, 2 Rose, 256; Ex parte Barrow, id. 252.

[3] See the observations of Best, J., 2 Barn. & Cres. 412.

[4] D. Bayley, J., 3 Dowl. & Ryl. 758.

whole property assigned, the agreement being that the partnership should be dissolved; that a certain specified part of the joint property should belong to the dormant partner, the remainder to the ostensible partner, and that the latter should pay the partnership debts. But the question has been settled by other cases,[1] from which it may be clearly inferred, that if a person who has a dormant partner becomes bankrupt *during the continuance of the partnership*, the dormant partner's share of the partnership property is to be considered in the bankrupt's order and disposition, as reputed owner, and consequently as passing to his assignees. It may be concluded, therefore, that the dormant partner's share in the hands of a remaining partner who becomes bankrupt, must vest in his assignees, though assigned to the remaining partner, in trust for the creditors of the partnership.

In cases where the general rule now under discussion is held to be qualified by the doctrine of reputed ownership, the consequences will be most material to the creditors. Thus, where A & B, being partners, take a dormant partner C, and upon his accession all the personal chattels and debts of the old partnership are expressly assigned to the new partnership, here, notwithstanding the express agreement that this property shall be the joint property of the three, the creditors of the old partnership have a right to prove against the joint property of the partnership *pari passu* with the creditors of that partnership, because here the original partners retain the order and disposition of the goods as reputed owners, and their creditors have a right of payment under the express terms of the statute, independently of any rule in bankruptcy.[2] But even in this case it has been laid down that the new creditors have a better right, upon principle, than the old creditors, because the new creditors have trusted the firm on the faith of their apparent funds, including the capital of the dormant partner; whereas the old creditors have not trusted them on the faith of those bonds, but only forborne to sue them upon the faith of their apparent stability. And upon these considerations the court in cases of this nature holds, that the creditors of the apparent partners, though they have a right, by force of the statute, to prove against the joint estate of the actual partnership, yet shall not exclude the creditors of the actual partnership from sharing in such proof.

---

[1] Smith v. Watson, 2 Barn. & Cres. 401, 3 Dowl. & Ryl 751; Ex parte Chuck, Mont. 364; 8 Bing. 469.

[2] Ex parte Chuck, 8 Bing. 470.

What is separate estate in bankruptcy.

SEC. 909. Whatever was made separate estate by agreement amongst the partners, and does not consist of goods and chattels in their *reputed ownership,* is separate estate under the bankruptcy.

In the case of Smith v. Smith, the leading facts of which have been already stated, the partners agreed that certain freehold and copyhold estates, which were from time to time purchased by one of the partners with the partnership funds, should, although the rents were carried to the partnership account, be considered as the separate property of the purchaser, the latter being deemed a debtor of the firm for the purchase-money. A joint commission of bankrupt having issued against the partners, the real estate was held to be separate, according to the terms of the agreement, and, therefore, although distributable among the separate creditors of that partner to whom it belonged, yet clearly chargeable with his wife's dower.

So, in a case,[1] where A, having carried on the business of a soap maker, took B into partnership, and upon this it was agreed between them, that a leasehold manufactory, in which the business was carried on, should remain the separate property of A; upon the bankruptcy of the firm, there was no question that if the effects had not been destroyed before the bankruptcy, the proceeds of the manufactory would have been distributable as the separate property of A.

To what extent and under what circumstances goods and chattels may be deemed in the order and disposition of the partners, or some of them, without being in the reputed ownership of the firm is a question of some nicety. In Ex parte Hare,[2] certain household furniture, which belonged to one of the partners, was used in the house where they conducted their business, and treated as partnership property; and the court of review held that it was distributable as joint estate, and not as the separate estate of the partner to whom it belonged; but from the contradictory reports of this case, it is impossible to tell whether the court considered it to be in the reputed ownership of the firm. It may be collected, however, from both reports, that the court did not consider it necessary to resort to the doctrine of reputed ownership in order to decide that case.

When separate estate is joint estate in bankruptcy.

SEC. 910. Whatever was made separate estate by agreement amongst the partners, but is comprehended under the term "goods or chattels

[1] Ex parte Smith, 3 Madd. 63; Buck, 149.

[2] 2 Mont. & A. 478; 1 Dea. 16.

in the possession, order, and disposition of the copartnership, or whereof they were reputed owners at the time they became bankrupt," is joint estate under the bankruptcy.

Thus, in the case of Ex parte Smith, which we have just cited, it was agreed that the utensils, as well as the manufactory, should remain the separate property of A; but, although the opinion of the court was otherwise as to the manufactory, yet, as to the utensils, there seemed to be no doubt that if they had not been destroyed before the bankruptcy, they would have been distributable as joint property, by virtue of the statute.

Again, A, B, and C were partners; C was interested in the profits, but had no share in the capital, which belonged exclusively to A and B. A joint commission having issued against A, B, and C, the property of A and B was distributed under the commission, as the joint property of A, B, and C.[1]

Again, A and his son B, being partners, A, in consideration, as expressed by assignment, of natural love and affection to B, assigned to him certain ships used in the trade, which were thereupon registered in the sole name of B. The capital of the business having been advanced by A solely, it was contended for his separate creditors that the proceeds of the vessels included in the assignment ought to be declared part of his separate estate, he having assigned them without sufficient consideration. But the commissioners certifying that the ships were in the order and disposition of the bankrupts at the date and suing forth of the commission, Lord Eldon made an order confirming the certificate, and declaring the ships in question to be part of the joint estate of A and B.[2]

We may here mention, as referable to the rule above stated, the case of Horn v. Baker,[3] in which, upon the dissolution of the partner-

[1] Ex parte Hunter, 2 Rose, 382; Ex parte Jackson, 1 Ves. 131.

[2] Ex parte Burn, 1 Jac. & Walk. 378; Ex parte Jones, 4 Mau. & Sel. 450, overruling Ex parte Yallop, 15 Ves. 60; and Ex parte Houghton, 17 id. 252; see, also, Robinson v. M'Donnell, 5 Mau. & Sel. 328; Hay v. Fairbairn, 2 Barn. & Ald. 193, Monkhouse v. Hay, 2 Brod. & Bing. 114; Kirkley v. Hodgson, 1 Barn. & Cres. 580; in which cases it was held, that where the ship was mortgaged, but remained in the order and disposition of the mortgagor, upon his bankruptcy it passed to his assignees, whether the ship was registered in the name of the mortgagor or the mortgagee. But now, by the 6 Geo. 4, c. 110, s. 46, mortgagees are protected under such circumstances, provided the transfer shall have been truly registered according to the provisions of that act.

[3] 9 East, 215. Where a person erects fixtures on the land which he occupies for the purposes of his trade, and mortgages his interest in the land, together with the fixtures, and then becomes bankrupt, such of the fixtures as are annexed to the freehold will pass to the mortgagee, and such as are not so annexed will pass to the assignees of the bankrupt as reputed owner, unless there be any evidence of a custom to hire chattels of this last description, in

ship between A, B, and C, and the creation of a new partnership between C and J, it was agreed that certain leasehold premises, vats and stills, and utensils of trade, in which A had the sole interest, should be enjoyed by C and J for the purposes of their partnership, under covenants for payment of an annuity to A for his life, for keeping the vats, stills, and utensils in proper repair, and for delivering them up at the expiration of the leases if not purchased, with a proviso for re-entry by A in case of non-payment of annuity. C and J became bankrupt, and it was held that such of the vats, stills, etc., as were affixed to the freehold, remained A's separate property, but that such as were not so affixed, were in the order and disposition of C and J as reputed owners thereof.

But in order to make the separate chattels of one partner distributable as joint property, they must have been in the possession, order, or disposition of the partnership at the time of the bankruptcy. Therefore, where it was agreed between A and B, partners, that the utensils of the trade should remain the separate property of A, and they were afterward, but before the bankruptcy of the partners, destroyed by fire, it was held that the money coming to the assignees for the insurance of the utensils, was distributable among the separate creditors of A.[1] So, where A, one of the part owners of a ship, insured his share of the ship and cargo, and the ship was lost, and A afterward became bankrupt, it was held that the money coming to the assignees for the insurance was the separate property of A.[2]

Joint estate, converted into separate.

SEC. 911. Whatever has been converted into separate estate, and is no longer in the order and disposition of the partnership, is separate estate under the bankruptcy.

Therefore, if, upon the dissolution of a partnership, the retiring

---

which case the presumption of disputed ownership will be rebutted. Horn v. Baker, *supra;* Ex parte Wilson, 2 Mont. & A. 71. This rule will not be altered by the fact of the mortgage being made by several persons in partnership, one of whom has the legal interest in the freehold, for in such case, the legal owner mortgages both on his own account and as agent of the firm. Ex parte Lloyd, 1 Mont. & Ayr. 513. The difficulty in these cases seems to consist in determining what is an annexation to the freehold. Compare the observations of Erskine, C. J., 1 Mont. & Ayr. 514, with those of Lord Lyndhurst in Trappes v. Harter, 2 C. & M. 180, 181. Where the fixture cannot be removed without injury to the building to which it is attached, it is clearly to be considered as annexed to the freehold. On the other hand, even if it be not so incorporated with the building as to make it irremovable by the tenant, on the ground of destructive waste, it may be considered of such a permanent nature as to be free from the operation of the rule as to reputed ownership.

[1] Ex parte Smith, 3 Madd. 63.

[2] Ex parte Parry, 5 Ves. 575; Ex parte Browne, 6 id. 136.

partner *bona fide* assigns all his interest in the stock and effects to the remaining partner, who afterward becomes bankrupt, so much of the partnership stock so assigned as remains in specie will vest in the assignees of the bankrupt as his separate property, and will be distributable accordingly. The leading case on the subject is Ex parte Ruffin.[1] There, Thomas Cooper and James Cooper were partners. By articles, dated the 3d November, 1798, the partnership was dissolved, and the buildings, premises, stock in trade, debts, and effects, were assigned to James Cooper by Thomas Cooper, who retired from the trade. The parties likewise covenanted to abide by a valuation to be made of the partnership property, and James Cooper covenanted to pay the partnership debts then due, and to indemnify Thomas Cooper against them. A bond for 3,000*l.*, the calculated value of the partnership property assigned, was given to Thomas Cooper by James Cooper and his father as surety. In pursuance of the covenant, the partnership property, consisting of leases, the premises where the trade had been carried on, stock, implements, outstanding debts, and other effects, were valued by arbitrators at 2,030*l.*, after charging all the partnership debts then due. All the joint creditors knew of the dissolution and the assignment of the property, advertisements were published, and James Cooper, after the dissolution, received many debts due to the partnership, but paid more on the account of the partnership. He paid the interest of the bond regularly, and intended to pay the principal when due. A commission of bankrupt afterward issued against him.

Upon a petition by the joint creditors, stating these facts, and praying that the partnership effects remaining in specie might be sold, and that the outstanding debts might be accounted joint estate, Lord Eldon dismissed the petition. After having adverted to the general principle of creditors having no primary lien on the partnership effects, but only either a demand at law, created by legal process, or a demand in equity or in bankruptcy, arising from the equity of the partners amongst themselves, he said — "A *bona fide* transmutation of partnership property is understood to be the act of men acting fairly, winding up the concern, and binds the creditors; and, therefore, the court always lets the arrangements be as they stood, not at the time of the commission, but of the act of bankruptcy. Thomas Cooper is admitted to be solvent. He certainly has no such equity,

[1] 6 Ves. 119; and see Ex parte Freeman, Buck, 471; Ex parte Fry, 1 Glyn & Jam. 96.

as if the partnership had been dissolved by bankruptcy, death, efflux-ion of time, or any other circumstance, nor his own act. But he dissolves the partnership a year and a half ago, and, instead of calling upon these effects, according to his equity at the dissolution, to pay the partnership debts, he assigns his interest to the other, to deal as he thinks fit with the property, to act with the world respecting it, desiring only a bond to pay a given value in three or four years. Therefore, he or his executors could not sue. If it was necessary for the creditors to operate their relief through his equity, he had no equity. The assignment was not made subject to the payment of the debts, but in consideration of a covenant, leaving no duty upon the property, but attaching a personal obligation upon the assignee to pay the debts, the creditors, therefore, cannot rest on the equity of the partners going out."

The case of Ex parte Fell[1] was similar to the foregoing. There, A and two others being partners, A retired, and due notice was given of the dissolution of the partnership. Upon his retirement, A, by deed, assigned his share of the stock, etc., to the remaining partners, in consideration of a certain sum, and the remaining partners covenanted to indemnify him against the partnership debts. The remaining partners became bankrupt. A, having been arrested by the creditors of the old partnership, petitioned that the specific stock and debts of the old partnership might be applied in satisfaction of the creditors of that partnership in preference to the creditors of the new firm. But Lord Eldon dismissed the petition, being of opinion that the case fell precisely within the same rule as Ex parte Ruffin.

How joint estate may be converted into separate.

SEC. 912. In order to convert joint into separate property, it is not necessary, in the case of goods in specie, that there should be a deed of assignment to the remaining partner. It appears that delivery of the goods, coupled with due notice that the partnership is dissolved, and the remaining partner will pay the debts of the firm, is sufficient evidence of an agreement to change the ownership. In Ex parte Williams,[2] Shepherd and Smith, who were in partnership as linen-drapers, dissolved their partnership on the 5th of September, 1803, inserting a notice in the London Gazette on the 25th of November, in that year, stating that the partnership was dissolved by mutual

[1] 10 Ves. 347. [2] 11 Ves. 3.

consent on the 5th of September last, and that all debts due from the partnership were to be paid, and would be discharged by Shepherd. On the 24th of December following, a commission of bankrupt issued against Shepherd, when it was ascertained, upon inquiry, that the effects, to a considerable amount, belonging to the partners at the dissolution of the partnership, were remaining in specie, and that several outstanding debts to the partnership were still remaining due. The commissioners, having refused to include any part of such specific effects, as forming part of the joint estate, a petition was presented to the Lord Chancellor, praying an account, and that such effects might be declared to form part of the joint estate. But Lord Eldon dismissed the petition. "The creditors," he said, "are not injured by the agreement of partners to dissolve the partnership, and that from that time what was joint property shall become the separate property of one, notice of the dissolution being given; as either a consideration is paid, or, which for this purpose is equal to a consideration, a covenant is entered into to pay the debts and indemnify the retiring partner, so conceived as not to leave any lien upon the property. The question then, here, is whether the contract for dissolution has left the equities of the partners attaching upon the possession. If it is competent for partners to say those equities shall no longer exist, inquiry is necessary to ascertain whether, by the bargain for the dissolution, that which was the property of all has become the property of one. In Ex parte Ruffin there could be no doubt upon that, a legal instrument being produced, the legal effect of which was such as I have stated. That case was no more than that a bankruptcy happening a considerable time after the execution of the deed, the effects came to be considered the separate effects of the trader in whose hands they were left, and the other was only to come in as a creditor. Upon the facts of the case, there is distinct evidence to an agreement that the joint effects should be considered separate effects, and that fact calls upon me to declare the conclusion of law that these are separate effects."

What is essential to make conversion complete.

SEC. 913. But, in order to make the conversion of joint into separate property complete, every requisite of transmission must be attended to, according to the nature of the property assigned. Therefore, debts due to a partnership, whether by bond or simple contract, will not be converted into separate property of some or one of the partners, unless due notice be given to the debtor of the conversion,

for, until notice be given to the debtor, the debt remains in the order and disposition of the creditor, and is still payable to him whether or not he has parted with his security.[1] The case of Ex parte Monroe[2] may be mentioned in connection with this subject, although there the assignment was made of a debt due to a sole creditor only. A, the obligee of a bond, being indebted to B as a security for his debt, assigned to him, by writing, the bond debt, and also delivered the bond into his possession, but notice of the assignment of the bond debt was not given to the obligor. A having become bankrupt, his assignees, under an arrangement with B, sued the obligor on the bond and recovered the amount due. B then petitioned to have the money so recovered paid in liquidation of his debt, as far as it would extend, and be allowed to prove the residue under the commission. But Sir John Leach dismissed the petition, being of opinion that the debtor having had no notice of the transaction, the bond debt, even after the delivery of the bond, was left in the ordering and disposition of the bankrupt, Did the delivery of the bond by the bankrupt take away the power to receive the debt? and if the obligor had *bona fide* paid the debt to the bankrupt, could the petitioner have called upon him to repay it? Certainly not; and if an action had been brought on the bond against the obligor, he might have discharged it by way of set-off in respect of any dealings with the bankrupt without notice of the assignment.[3]

In the preceding case, B, the assignee of the debt, was a stranger, but had he been a partner with A, the decision must have rested on the same principles.

In two subsequent cases,[4] where it appeared that upon the retirement of some of the members of a firm, they assigned the debts due to a

[1] See the judgment of Lord Chief Baron Parker, Ryall v. Rowles, 1 Ves. 367; also Jones v. Gibbons, 9 id. 410, and the opinion of the commissioners in Ex parte Williams, 11 Ves. 3; see, also, Ex parte Gibson, 2 Mont. & A. 10; 2 Sim. 257; Ex parte Leaf, 1 Dea. 176.

[2] Buck, 300.

[3] But, of course, where a creditor has assigned a debt due to him to a third person, and notice of the assignment has been given to the debtor, payment must be made to the assignee, for *quod jussu alterius solvitur pro eo est quasi ipsi solutum esset*. Pothier, treating of this subject, says; "Celui à qui le creancier a cedé sa créance, à quelque titre que ce soit, soit de vente, soit de donation, soit de legs, en devient le creancier par la signification qu'il fait au debiteur de son titre de cession; ou par l'acceptation voluntaire que le débiteur fait du transport; et par consequent le paiement qui lui est fait est valable. Au contraire, l'ancien creancier cesse de l'être par cette signification que le cessionaire fait au debiteur, ou par l'acceptation du transport; et le paiement qui seroit fait depuis a l'ancien creancier ne seroit pas valable." Pothier, Tr. des Oblig. part 3, c. 2, art. 2, s. 1. And see more on this subject, in Cod. lib. 48, tit. 3, s. 4; also Dig. lib. 46, tit. 3, ss. 12, 34, 56, 91, etc.; Code Civil, par Rogron, art. 1249, *et seq.* Du paiement avec subrogation.

[4] Ex parte Burton, 1 Gly. & Jam. 207; Ex parte Usborne, id. 358.

partnership consisting of simple contract debts, to the remaining partner who covenanted to discharge all the debts owing by the partnership, and, accordingly, notice was given in the London Gazette of the dissolution of the partnership, and that debts due to the partnership would be received by the remaining partner, it was held that such notice in the Gazette was not sufficient notice to the debtors of the assignment of their debts, that the assignment was therefore incomplete, and that, consequently, upon the subsequent issuing of a joint commission against the members of the original firm, the debts so defectively assigned were still to be considered the property of the original partnership, and distributable accordingly.

All the terms of the contract must be complied with.

SEC. 914. And, generally, in the assignment of the partnership effects, of whatever description, every term of the contract must be satisfied before the conversion can be deemed complete. Therefore, where a retiring partner by agreement in writing, assigned all the stock, debts, etc., to the remaining partner, who agreed to pay a debt owing by the retiring partner, and also to pay him an annuity for the due payment of which the agreement recited that the father of the retiring partner, who was not a party thereto, would be security, it was held that this being but an executory agreement, and the father refusing to become security, the partnership stock, etc., was not thereby transferred to the remaining partner. So, where, after a dissolution and assignment of the partnership effects to one of the partners, a bill was filed by the retiring partner against the other alleging fraud in the non-performance of the articles of dissolution, and praying an injunction and receiver, which were ordered, it was held, upon a subsequent bankruptcy, that such interference of the court, arising from the non-performance of the articles, restored the property to its original character as joint property, unless the plaintiff in equity had, by his conduct between the time of his obtaining the injunction and the bankruptcy, rendered nugatory the effect of such interference. And upon that an inquiry was directed.[2] So, where upon the dissolution of the partnership of A and B, father and son, the agreement was, that all matters respecting the final adjustment of the partnership should be settled by arbitration, and,

[1] Ex parte Wheeler, Buck, 25. But see Young v. Keighly, 15 Ves. 558, where the agreement to convert separate into joint property was only in part performed, yet the court treated the conversion as complete. The point, though noticed by the Master, was not made the subject of argument.

[2] Ex parte Rowlandson, 1 Rose, 416.

until B should be otherwise adequately provided for, his father, who continued the business, should allow him a third part of the profits, Lord Eldon said that the property which had belonged to them, and the transfer and assignment of it by the one to the other, were matters still dependent upon arbitration, and as such rendering it difficult for the father to say that the property was his, though, in case of the bankruptcy of the latter, it might be distributable as his on the ground of its being stock left in his order and disposition by his son, a *dormant* partner.[1]

In the case just cited, A, the father, after the dissolution of the partnership with his son, entered into partnership with another person, C, carrying into that new partnership the remaining stock of the old concern and blending it with the stock of A and C; they, in the course of their dealings and transactions, introducing new stock, and intermixing it with the old, as the visible property of A and C. A and B afterward having become bankrupts, and the assignees under their commission having possessed themselves of all the joint effects of A and C to an amount more than sufficient to satisfy the joint creditors of that firm, and C having relinquished his claim to the surplus, Lord Eldon held that the surplus was the separate property of A and not the joint property of A and B.

In Ex parte Gibson,[2] it was made a question, whether an agreement, on the dissolution of a partnership, to assign the partnership property in consideration of 50*l.* paid, and five bills for 100*l.* each, was executed or executory, the bills not amounting to payment, but merely to security; but the Court of Review held that though the giving the bills was security and not payment, yet the agreement was not, therefore, executory, because it was clear that the parties considered the payment of the 50*l.* and the delivery of the bills as being all that was required to be done to fulfill the agreement and complete the transfer. The court, therefore, declared that the stock in trade of the original partners became that of the remaining partners on the day of the dissolution.

In this last-mentioned case one of the judges, Sir George Rose, expressed a doubt, whether if the property had been real instead of movable, the bills would not have given the retiring partner a lien on the real estate. Upon the principles upon which this particular case was decided, it is difficult to see how the nature of the property

[1] Ex parte Barrow, 2 Rose, 252.

[2] 2 Mont. & A. 4; Ex parte Clarkson, 4 D. & C. 56.

could have made any difference. Unquestionably, however, in similar cases in which real estate has been involved, the vendor has been held entitled to such a lien.[1]

When conversion may be defeated.

SEC. 915. In some cases the conversion, though absolute, may be liable to be defeated on the happening of a certain event. If the event happen before the bankruptcy of the party to whom the partnership property is assigned, all the parties interested in it will be remitted to their original rights; the bankrupt being trustee of the interest which thus arises. If, on the other hand, the event happen after the bankruptcy, the bankrupt being at his bankruptcy the true owner of the property, his assignees will take it subject to his liabilities. It follows that in both cases the equitable rights of the parties entitled under the conversion will prevail against what otherwise might be the bankrupt's right by reputed ownership; for on the one hand, we have already seen that a trust is not affected by the 72d section of the statute, and on the other hand, to give effect to that section, the bankrupt must be the apparent, but not the true owner of the property of which he has the disposition.

These observations seem to be warranted by the case of Ex parte Pemberton.[2] There Pemberton and others, as executors of Samuel Pemberton, were in partnership with George and Thomas Stokes. Upon their retirement from the partnership, of which notice was given in the Gazette, the executors executed a deed of even date with the notice, whereby, in consideration of 49,600*l.*, they assigned to George Stokes and Thomas Stokes all their share in the partnership stock and debts, and gave a power of attorney to recover the debts. George Stokes and Thomas Stokes covenanted to pay the 49,600*l.* by installments of 3,000*l.*, at the times therein mentioned, and it was provided that if any installment were unpaid for thirty days, the executors might enter and distrain on the partnership premises; and that if any installment were unpaid during sixty days, then that the executors might re-enter on the whole late partnership estates and property, and on such re-entry the deed was to become void. And George Stokes and Thomas Stokes covenanted that on such re-entry, they would, on demand, resign the whole partnership premises to the executors, on trust to sell the same, and pay the 49,600*l.*, or so much as might be then due. Due notice of this assignment was given to

[1] Ex parte Peake, 1 Madd. 346; Grant v. Mills, 2 Ves. & B. 306.

[2] 2 Mont. & A. 548; 1 Deac. 44.

the debtors of the partnership. Thomas Stokes afterward retired, and George Stokes became bankrupt. Default being made in payment of the installments, the question was whether a debt due to the firm of Pemberton & Stokes belonged to Pemberton or the assignees of George Stokes. At the first hearing of the petition, it was assumed that the default occurred after the bankruptcy, but it turned out otherwise, and accordingly the Court of Review granted a second hearing. The court, however, was of opinion that in either case the result was the same; for that, on the former supposition, George Stokes was the real owner, subject to a condition in the deed, under which he might be called on to re-assign, and that on non-performance of the condition his assignees became subject to his liabilities; the rule as to reputed ownership not applying to a case where the bankrupt is the real owner, and that, on the latter supposition, George and Thomas Stokes became the owners, in trust for the executors, in which case, also, in the event of their bankruptcy, the doctrine of reputed ownership would not apply.[1]

Conversion not affected by knowledge of the firm that it was insolvent.

SEC. 916. The effect of conversion of joint into separare estate will not be altered by the circumstance that, at the time it took place, the partners knew that the firm was insolvent, for, as we have already seen, a conversion under such circumstances is not necessarily a fraud upon creditors. A and B being partners, B, who was aware of, or suspected the insolvency of the firm, was permitted to retire. Upon his retirement he conveyed all his interest in the real estate of the partnership to A, who gave his drafts for the amount of the purchase-money. The drafts were afterward dishonored, and A ultimately became bankrupt. It was held that, under the conveyance, the joint property of A and B became the separate property of A, and, consequently, that B had a lien upon it for the amount of the purchase-money due to him.[2]

In all cases, the validity of the contract between the partners for the conversion of the property must depend on the *bona fide* of the transaction. Thus, though in Ex parte Ruffin the remaining partner was for a year and a half treated by the world as a sole trader, which certainly made the case more strong in favor of the assignees, yet, in a subsequent case, in which a similar question arose, a similar

[1] The case of Horn v. Baker, *ante*, was cited in argument in the principal case in support of the reputed ownership; but there, it will be perceived, the assignment was not absolute.

[2] Ex parte Peake, 1 Madd. 346.

judgment was given, although the dissolution took place only a week before the bankruptcy, the conversion having been made *bona fide*.[1]

Creditors cannot prevent conversion.

SEC. 917. From what has preceded, it appears that the creditor of a partnership has no control over the partnership property, so as to prevent the conversion of joint into separate estate, or *vice versa*. But when a partnership is dissolved, and the partnership effects are assigned absolutely to the remaining partner, who covenants to pay partnership debts, the partnership creditor may accept the remaining partner as his separate debtor;[2] and, in that case, upon the subsequent bankruptcy of the remaining partner, such creditor will enjoy all the rights of a separate creditor of the remaining partner.

But, of course, the joint creditor's acceptance of the remaining partner as his separate debtor comes too late after the bankruptcy of the latter. In such case, the joint creditor must abide by the contract of conversion made by his debtors. "I agree," said Sir John Leach, "that it may be some hardship upon joint creditors, that the joint stock, to which they may have specially given credit, should, by the dealing of their debtors with each other, be thus converted into separate estate. That hardship would have been avoided, if it could have been held that where, upon a dissolution, one of two partners is to become the sole owner of the joint stock, and it is a part of the consideration that he shall pay the joint debts, such joint stock shall not in bankruptcy be considered as actually converted into his separate estate, unless he has paid the joint debts. But the case of Ex parte Ruffin, and the other cases of that class which followed it, have established that the legal principle, which converts the joint estate into the separate estate by the mere force of the contract, is too strong for this equity."

---

[1] Semble, Ex parte Snow, 1 Co. Bl. 511. Compare D. Lord Eldon, Ex parte Williams, 11 Ves. 3; D. arg. Romilly, etc., Ex parte Fell, 10 id. 347.

[2] Ex parte Freeman, Buck, 471.

CHAPTER XLI.

OF JOINT AND SEPARATE DEBTS.

SEC. 918. Separate debts, what are.
SEC. 919. How separate debt is converted into joint.
SEC. 920. What amounts to conversion, and how proved.
SEC. 921. Of proof in general. Priority of joint creditors as to joint estate of separate creditors.
SEC. 922. Exceptions to rule as to dividends with separate creditors.
SEC. 923. When a joint creditor is a petitioner under a separate flat.
SEC. 924. Where there is no joint estate and no solvent partner.
SEC. 925. Where there are no separate debts.
SEC. 926. As to interest.
SEC. 927. When partners may be creditors upon each other.
SEC. 928. Enforcement of joint debts, against whole of deceased partner.
SEC. 929. Of election of remedy.
SEC. 930. Confined to same debt.
SEC. 931. Confined to bonds, bills and personal securities.
SEC. 932. Of election of proof.
SEC. 933. Rule when debt has been converted with or without extinguishment.
SEC. 934. When debt has been collusively converted.
SEC. 935. Rule when dormant and ostensible partners become bankrupts.
SEC. 936. When a demand may be split.
SEC. 937. Of the time of elections and waiver of proof.
SEC. 938. Of double remedy.
SEC. 939. Of double proof.
SEC. 940. Limitations as to double proof.
SEC. 941. Of proof between partners.
SEC. 942. Qualification of the rule.
SEC. 943. Exceptions of a special nature.
SEC. 944. What debts one partner may prove against separate estate.
SEC. 945. When one partner may prove against separate estate, although not sufficient to pay separate debts.
SEC. 946. Rule as to distinct fines.
SEC. 947. When there are no joint debts.
SEC. 948. Of proof between estates.

SEC. 949. Exceptions to rule.
SEC. 950. Rule when one partner is appointed manager of firm business.
SEC. 951. Rule when some of the partners form a distinct firm.
SEC. 952. Of set-off.
SEC. 953. Equitable set-off.

Separate debts, what are.

SEC. 918. Separate debts are those for which the creditor can have his remedy at law, not against the whole firm, but against that partner only who contracted them; joint debts are those for which an action, if brought, must be brought against all the partners constituting the firm.[1] In all cases, therefore, when a partner becomes liable for a debt contracted by his copartner, a joint debt is created, and the creditor is a joint creditor of the firm.

As the various liabilities of partners have been already considered, it would be needless to recapitulate them here, or to show in what manner they give rise to what in bankruptcy are termed joint debts. Nevertheless, there are one or two important points connected with the subject of joint and separate debts, but unconnected with the general question of liability, which deserve our consideration in this place. Thus, upon the bankruptcy either of a firm or of an individual partner, one question may arise, whether certain debts, which were originally separate, have been converted into joint debts, or *vice versa*; and again, another question may arise, whether those debts have been converted, with or without extinguishment of the original duty or obligation.

The importance of the latter as well as the former question is obvious. For where a debt is converted with extinguishment, it is on the hypothesis that the creditor has received a consideration for the change: here, therefore, he can only rely on his debt according to its new quality, and consequently is entitled to only one mode of proof. But where a debt is converted without extinguishment, the creditor can take advantage of it, according either to its old or its new quality; he may consider it either as a joint or separate debt and consequently will be entitled to an election of proof.

It is evident from these considerations, that the conversion of a debt without extinguishment is upon the whole beneficial to the creditor. Where, therefore, a debt has been converted, and the creditor seeks the benefit of his old security, he must prove that such security

[1] Archb. B. L., Book 1, chap. 2; and see the judgment of Lord Eldon, in Ex parte Williams, Buck, 13.

has not been extinguished. On the other hand, where the creditor conceives his debt to have been converted, and seeks the benefit of his new security, he must prove a sufficient conversion. Here, therefore, are two points for our consideration—1. What amounts to an extinguishment of the original obligation. 2. What is a sufficient conversion.

How separate debt is converted into joint.

SEC. 919. If the separate creditor of a partnership take a partnership bill in full discharge of his claim, the separate debt is thus converted into a joint debt, and the original remedy extinguished. But if the evidence goes to show that the bill is given, not in discharge of, but by way of collateral security for the original debt, in such case the original remedy is not lost.[1]

In Ex parte Seddon,[2] the petitioners had sold goods to one of the bankrupts, which were paid for by a joint note, and a receipt was given by the petitioners as for money paid, not expressing the payment to be made in the manner it really was. The question was, whether the petitioners had not accepted the security of the joint note in full satisfaction of the debt, so as to preclude their coming on the separate estate. Lord Thurlow — "To be sure, on the face of the note it is a joint debt; but the question is, whether the creditor may not maintain his debt for the goods sold and delivered? That is, does the note extinguish the debt? If it had been a bond given instead of the note, it would clearly have done so; but the note was no payment; and then, as to the receipt, if it had remained unexplained, it would have been evidence of the debt being paid; but, when it appears how the receipt happened to be given, it is not conclusive.[3] I think this may be proved as a separate debt."

Again, in Ex parte Lobb,[4] where separate creditors had taken a joint security, it was held that the original debt was not thereby extinguished. The peculiar circumstances of this case rendered the question of extinguishment or no extinguishment somewhat doubtful; and Lord Eldon accordingly made the order with some hesitation. The case was this: A and B were partners. The petitioners sold goods to them separately. The goods were delivered to each separately; debited in the books so; and the transactions were entirely separate. There were some joint debts, but to a small amount, due

[1] See D. Rose, J., 3 Mont. & A. 643.
[2] 2 Cox, 49.
[3] Upon this subject, see Scaife v. Jackson, 5 Dowl. & Ryl. 37; 3 Barn. & Cres. 421; *ante*, p. 485.
[4] 7 Ves. 592.

to the petitioners. A came to the petitioners for the purpose of settling his accounts and paying his debts; and at the same time he expressed a desire to settle and pay the bill due from B, and every other matter of account between the petitioners and them. The petitioners at his request, as the easiest mode, made out one general balance sheet of the debts due jointly as well as separately, upon which a considerable balance was due to the petitioners. A undertook to settle with his partner; and the petitioners with each other; and by the desire of A a bill at two months was drawn upon him and B for the balance. Before the bill was due A and B became bankrupt. The petitioners applied to prove their original debts against the separate estates. Lord Eldon said, clearly they must give up the bill; and that being admitted, his Lordship made the order, observing that the point, whether by taking the joint security they were not concluded, might bear argument, but he thought they might resort to their original debts.

The case of Ex parte Meinhertzhagen[1] may be referred to the same principle. There A deposited Virginian bonds with his agent B, who pledged them for a debt of his own. Afterward B, at the request of A, agreed to give him credit on the security of the bonds to the amount of 10,000*l.*, for which sum A drew bills of exchange on B. On the day the bills were drawn, B took C into partnership, and the bills were accepted by B & C. A had subsequent dealings with B & C. Upon the bankruptcy of B & C it was held, notwithstanding the joint acceptance and the subsequent dealings, that A might prove the amount of the bonds against the separate estate of B.

Again, in Ex parte Roxby,[2] a joint creditor of a firm having taken the separate draft of one of the solvent partners, petitioned to prove against the joint estate. But Lord Erskine refused the proof, until it should be ascertained that the original debt had not been extinguished. His Lordship said that the question was, whether the bill was given as a collateral security, or in discharge of the debt; as to which fact an affidavit must be made.

Again, in Ex parte Hodgkinson,[3] the question was, whether, there being an acknowledged joint debt at one time, it was gone by the joint creditors taking a separate security, namely, a bill drawn by one of the bankrupts, but which had never been paid. Lord Eldon was of opinion that the bill had been taken as a mode of satisfying the

[1] 3 Dea. 101.
[2] 1 Mont. Part. 203.
[3] Coop. 101.

debt, but not in discharge of it, and that the bill not having been paid when due, the so taking it went for nothing, consequently, that the creditors were still entitled to prove against the joint estate.

Again, in Ex parte Hay,[1] the joint and several bond creditor of a firm was deemed not to have deserted his several security by subsequently taking a bill indorsed to him by the firm in part satisfaction of his debt.

What amounts to conversion, and how proved.

SEC. 920. To proceed to the other point which we proposed to consider, namely: what amounts to a sufficient conversion.

The best evidence of conversion is an instrument in writing in the hands of the creditor, giving him a separate security for his joint debt, or a joint security for his separate debt. But, if the instrument impose terms upon the creditor, he must show that he has complied with those terms, if he seeks the benefit of the conversion given him by the instrument. In Ex parte Fairlee,[2] three persons in partnership covenanted jointly and severally with Fairlee & Co., their bankers and joint creditors, that they, the debtors, or some or one of them, should and would, on demand, well and truly pay to the creditors or the survivor or survivors, etc., every sum or sums of money, loss, cost, charges, damages and expenses for which provision was made by the indenture, "but any debt existing previous to such demand should be and remain a debt in like manner as if no covenant had been entered into for payment thereof, such covenant being intended only as additional or collateral security." The deed containing this covenant was a conveyance to the creditors of the real estate of one of the partners, upon trust to sell and repay themselves out of the produce. The estates were sold, and the produce applied toward satisfaction of the debt, but no demand was ever made in pursuance of the covenant. Upon the bankruptcy of the covenantors, the creditors petitioned to prove against the separate estates of the bankrupts. Sir Lancelot Shadwell, however, dismissed the petition with costs, observing that it was intended by the parties that an actual demand should be made. Some distinct acts are necessary to create a separate debt, and the parties had stipulated that it should be on demand. In this case, the transaction between the parties was not equivalent to a demand.

Upon appeal to Lord Lyndhurst, this decision was affirmed, though

[1] 15 Ves. 4.

[2] Mont. 17.

without costs. His Lordship, referring to the words, "any debt existing previous to such demand should be and remain a debt in like manner as if no covenant had been entered into for the payment thereof," said that, from these words, it appeared that an alteration was to be effected in the situation and liability of the parties by the demand, which must, of course, therefore, mean an actual demand. He was of opinion, therefore, that the debt continued a joint debt, as in its original form, until an actual demand was made, and then, upon that actual demand being made, it became a debt under the covenant.

When the creditor has no instrument to produce as evidence of conversion, but it is certain that a conversion took place as between his debtors, then, in order to obtain the benefit of such conversion, it will be sufficient if he prove that, before the bankruptcy, he assented to such conversion, or, in other words, that he accepted the new debtor or debtors in the place of the old. Slight evidence of acceptance is sufficient, but some evidence of this kind is certainly required.

In Ex parte Slater,[1] the execution by joint creditors of the composition deed of a remaining partner, together with a receipt of the composition, was held to be an election of him as their sole debtor, and they were not allowed to prove under a subsequent commission against the retiring partner.

In Ex parte Clowes,[2] several persons being in partnership together, and some of them being members of a minor partnership, agreed to consolidate various debts which were due from them separately, and to consider them as the debts of the general partnership. The creditors, under these circumstances, were allowed to prove their debts as joint debts.

It is true that, in this case, no evidence appears to have been given of express consent by the creditors to the arrangement of the partners. But, as some years elapsed between the arrangement and the bankruptcy, and as nothing is said which leads to a contrary supposition, the consent of the creditors to the conversion may, perhaps, be presumed. Lord Eldon, speaking of this case, observed that it turned upon the peculiar circumstances, that, when the general partnership agreed to take upon them the demands on the individuals and the other part-

[1] 6 Ves. 146. But it must be said that the decision turned on the deed being in the nature of a release.

[2] 2 Bro. 495; 1 Co. B. L. 260.

nership, one term implied was that their creditors should consent to be creditors of the general partnership only.[1]

In a late case on this subject the Court of Review had no hesitation in holding that a conversion had taken place of a separate into a joint debt, although the separate debt was secured by bond, and the joint debt was simply the debt of the partnership of which the obligor was a member. In this case the debt consisted of trust money under the marriage settlement of H which had been advanced to H on the security of his bond. The money was afterward, with notice to the trustees, applied to the purposes of the partnership in which he was engaged, and an entry to that effect was made in the partnership books under the head of "The Trustees of Mrs. H." Upon the bankruptcy of the partners the Court of Review, under these circumstances, held that there had been a sufficient assent on the part of the trustees to the conversion of the debt, and they were allowed to prove the amount against the joint estate of the bankrupts.[2]

On this subject of assent, Lord Eldon's opinion may be gathered from his observations in the cases of Ex parte Peele, and Ex parte Williams.[3] In the former of these cases it was scarcely necessary to advert to the question of assent by the creditor to the consolidating of the debts, as it was a disputed point whether the partners themselves had agreed to consolidate them. But, in the latter, where a separate creditor sought proof as a joint creditor, by virtue of an arrangement between two partners for the conversion of separate into joint debts, Lord Eldon required evidence of assent by the creditor to such arrangement before such proof could be allowed. In this case, A, a trader, being indebted to several persons, entered into partnership with B, and brought his stock in trade into the partnership. By the partnership deed it was agreed that the joint trade should pay the creditors of A named in a schedule. A and B entered into partnership upon the terms mentioned in the deed, and in pursuance thereof many of the creditors of A, whose debts were scheduled, were paid by the partnership. A joint commission having issued against A and B, the petitioner, one of the unpaid scheduled creditors, prayed that he might be permitted to prove his debt and receive a dividend out of the joint estate. But, per Lord Eldon, "If it is meant to be said on the part of the petitioner that a joint action might have been maintained by the creditors named in the schedule against the partners,

[1] Ex parte Bonbonus, 8 Ves. 546.
[2] Ex parte Kedie, 2 D. & C. 321, and see Ex parte Hill, 1 Deac. 123.
[3] Buck, 13.

immediately upon the execution of the deed, and by force of that deed only, independent of any accession to the agreement on the part of the creditors named in the schedule, I cannot assent to the doctrine. There are some old cases upon this subject, and in one of them (reported, I think, by Levinz, or by one of the reporters of his time) where A, by deed, covenanted with B, a party to it, that he, A, would pay a sum of money to C, a stranger to the deed; C attempted to maintain an action on the covenant against A. Whatever might then have been the law, such an action could certainly not now be supported. But I agree to the proposition that a very little will do to make out an assent to the agreement. If any of the creditors named in the schedule think they can make out such a case, they may apply on that ground to prove their debts against the joint estate."

The case of Ex parte Williams seems to establish not only the general question as to assent, but also, that a creditor seeking to take advantage of the conversion of a debt after the bankruptcy of his debtor, must show that he assented to the conversion before the bankruptcy. The same point was decided by Sir John Leach in Ex parte Freeman.[1] There the stock and effects of the partnership of Henderson & Morley were, upon a dissolution, assigned by deed to the continuing partner, Henderson, who covenanted to pay the joint debts. The partners having become bankrupts, the court held that the joint creditors not having previous to the bankruptcy accepted the continuing partner as their sole debtor, could not prove against the separate estate of such continuing partner. Sir John Leach: "It is not alleged that the joint creditors in any manner adopted Henderson as their separate debtor, and the question simply is whether the covenant of Henderson with Morley to pay the joint debts, without any concurrence on the part of the joint creditors, before the bankruptcy, does *ipso facto*, in the case of bankruptcy, convert these joint creditors into separate creditors of Henderson, either absolutely, or at their option. It is admitted, that if bankruptcy were out of the question, the joint creditor could not sustain an action at law against Henderson alone, upon the same naked effect of the covenant. My first difficulty is, to apprehend the distinction in this respect between bankruptcy and no bankruptcy. I cannot apprehend how the fact of bankruptcy makes a man my creditor who does not otherwise sustain that character. I have always considered it to be essential to proof, that the bankrupt should be indebted to the party proving at and

[1] Buck, 471.

before the bankruptcy. The engagement of one partner with the other to pay the debts of the firm can, as to the creditors of the firm, be considered only as a proposal that he is willing to become their sole debtor. If they accede to this proposal before the bankruptcy, then a contract to that effect is concluded, and under the bankruptcy they are his separate creditors. But their acceptance of him as their separate debtor after the bankruptcy comes too late, for he is then incapable of contract. For these reasons I am of opinion that the petitioners cannot be considered as separate creditors of Henderson."

This case of Ex parte Freeman seems to be consistent with most of those on the same subject that preceded it. It was, however, overruled by Lord Eldon. Nevertheless, as the grounds of Lord Eldon's decision do not appear, and as Sir John Leech decided the subsequent case of Ex parte Fry[1] in the same manner, there seems just reason to suppose, notwithstanding the observations of a learned writer,[2] that the case of Ex parte Freeman was rightly decided.

In the last two cases, the agreement between the partners for conversion of their debts was contained in a deed *inter partes*. It is true, therefore, that in each case the creditors, as being strangers to it, had no remedy at law under the deed.[3] It is apprehended, however, that these decisions did not turn merely on the circumstance of the creditors not having shown their assent by executing the deed, but on their not having given any assent, that in bankruptcy, the question of the conversion must depend on the assent, in whatever manner the assent is evidenced, that although there be a deed, bare assent will be sufficient, though it would be insufficient at law; and that, where there is no deed, assent will be necessary,[4] although perhaps it might be unnecessary at law.[5]

The latter proposition is borne out by the case of Ex parte Hitchcock.[6] There, A gave his guarantee for the payment of certain bills accepted by B. Afterward A and B became partners. They paid part of the bills, and solicited the creditor's indulgence as to the remainder. Their solicitations, which were by writing, received no answer from the creditor, but he took no hostile proceedings against them. Upon the bankruptcy of A & B, it was held that there was not sufficient evidence of assent by the creditor to the conversion of the debt into a joint debt, to enable him to prove against the joint estate.

[1] 1 Glyn & Jam. 96.
[2] 1 Mont. Partn. 117.
[3] Barford v. Stuckey, 5 Moore, 23; and see the cases cited, Buck, 15, note *a*.
[4] Ex parte Hunter, 1 Atk. 223.
[5] See the observations of Bayley, J., 2 Dow. & Ryl. 527.
[6] 3 Deac. 507.

But a debt may be treated by the creditor as joint or several, in all cases where it has been converted by the fraud of the debtor partner and his copartner.[1]

Judgment of outlawry against two or three joint debtors does not make the debt a separate one as against the third debtor,[2] nor does a separate execution taken out against one of several partners, for a joint debt, convert that debt into a separate debt.[3]

Of proof in general.—Priority of joint creditors as to joint estate of separate creditors as to separate estate.

SEC. 921. In the words of Lord Hardwicke, "Joint creditors, as they gave credit to the joint estate, have *first* their demand on the joint estate, and separate creditors, as they gave credit to the separate estate, have *first* their demand on the separate estate."[4] Again, in the words of Lord King,[5] "It is settled, and is a resolution of convenience, that the joint creditors shall be first paid out of the partnership or joint estate, and the separate creditors out of the separate estate of each partner, and if there be a surplus of the joint estate, besides what will pay the joint creditors, the same shall be applied to pay the separate creditors; and if there be, on the other hand, a surplus of the separate estate beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors." This rule was afterward deviated from by Lord Thurlow,[6] but restored by Lord Loughborough,[7] and followed by Lord Eldon.[8]

It appears, therefore, that putting out of the question the equitable right which either class of creditors has upon the surplus of either estate after the payment of the other class of creditors, the joint creditors can only prove and receive dividends as against the joint estate, and the separate creditors as against the separate estate.[9]

The rule has been occasionally productive of hardship. Thus, in Ex parte Jackson,[10] W, a trader, died indebted to J, leaving all his personal property to his widow. After his death the widow carried

[1] See *post*, s. 929.
[2] Ex parte Dunlop, Buck, 253.
[3] Ex parte Stanborough, 5 Madd. 80.
[4] Twiss v. Massey, 1 Atk. 67.
[5] Ex parte Cooke, 2 P. Wms. 500.
[6] Ex parte Hodgson, 2 Bro. 5; Ex parte Page, id. 119; Ex parte Flintum, id. 120; Ex parte Copland, Co. B. L. 248.
[7] Ex parte Elton, 3 Ves. 240; Ex parte Abell, 4 id. 837.
[8] Ex parte Clay, 6 Ves. 833; Ex parte Pinkerton, and Ex parte Nuttal, there cited; and see Dutton v. Morrison, 17 Ves. 206.
[9] Ord. Loughborough, Mar. 1794, and 6 Geo. 4, c. 16, s. 62. Where a creditor has proved against the wrong estate by mistake, he will be permitted to transfer his proof to the other. Ex parte Vining, 1 Deac. 555.
[10] 1 Ves. Jr. 131.

on the trade, and, having borrowed another sum from J., gave him a bond for the whole. Afterward she took into the trade her son, being a minor, and her nephew, who before was her servant. The new partners did not bring any property into the trade, nor were they to have any of the profits, nor bear any loss, but the nephew received wages as before. The partnership lasted nearly two years, till a commission of bankrupt issued against the widow and nephew, but not against the son. The petition was that J might be at liberty to prove his debt and receive dividends under the joint commission. Lord Thurlow, though with great reluctance, felt himself bound to refuse the prayer of the petition, there being no fraud in the widow.

The rule is the same, whether the fiat be joint or separate. When the fiat is joint, the separate creditors may, under Lord Loughborough's general order,[1] prove their debts and receive dividends out of the separate estate, that order directing that distinct accounts shall be kept of the joint and separate estates respectively. So, when the fiat is separate, and the assignees get possession of the joint property, the court, upon the petition of the joint creditors, will order the assignees to keep distinct accounts of the separate and joint estate and apply them to the payment of the separate and joint debts respectively, as when separate creditors prove under a joint fiat.[4]

Exceptions to rule as to dividends with separate creditors.

SEC. 922. There are, however, three exceptions to the rule that a joint creditor shall not receive dividends with the separate creditors: 1. Where a joint creditor is the petitioning creditor under a separate fiat.[2] 2. Where there is no joint estate and no solvent partner. 3. Where there are no separate debts.[5] In the first case, the petitioning creditor, and, in the second, all the joint creditors, may prove against the separate estate *pari passu* with the separate creditors. In the last case, as there are no separate creditors, the joint creditors will be admitted *pari passu* with each other, upon the separate estate.

Where a joint creditor is a petitioning creditor under a separate fiat.

SEC. 923. It was decided in Ex parte Crispe[6] that a commission or

[1] Ord. Mar. 1794. See Ex parte Crowder, 2 Vern. 706; Twiss v. Massey, 2 Atk. 67; where the relief, afterward provided for by Lord Loughborough's general order, was granted on petition.

[2] Ex parte Tate, Co. B. L. 253; Ex parte Aspinwall, id. 256; Ex parte Marvey, Ex parte Hill, id. Formerly, the application must have been made by bill, unless by consent. Ex parte Voguel, 1 Atk. 135; Hankey v. Garratt, 3 Bro. 457.

[3] Ex parte Hall, 9 Ves. 349; Ex parte Ackerman, 14 id. 604; Ex parte De Tastet, 1 Rose, 10; Ex parte Buckle, 1 Glyn. & Jam. 34.

[4] Ex parte Kensington, 14 Ves. 447.

[5] Ex parte Chandler, 9 Ves. 35.

[6] 1 Atk. 133; Crispe v. Perritt, Willes, 467.

fiat may issue against one partner for a joint debt, though an action cannot be maintained against one, without joining the other parties, a commission being considered as an execution, and not as an action. Hence, a separate commission taken out by a joint creditor, being in the nature of an execution for his legal debt, it follows that he is entitled to take the dividends due upon his legal proof. Where, therefore, M, being an indorsee of A, B & Co.'s acceptances for 1,364*l.*, sued out a separate commission against A, and at the time of suing out the commission, L, the person for whom A had discounted the acceptances, had, by payments on account, reduced the debt to 420*l.*, it was held that M was entitled to prove for the whole amount; that, for all that was received above 420*l.*, M was a trustee for L; and that the commissioners could not interfere with the trust.[1]

This exception in favor of the petitioning creditor under a fiat against one partner is expressly reserved by the 6 Geo. 4, c. 16, s. 62, which enacts that a joint creditor shall not receive a dividend out of the separate estate, until all the separate creditors have been paid in full, "unless such creditor shall be a petitioning creditor in a commission [fiat] against one member of a firm." From which, also, it appears that there is no exception in favor of a joint creditor taking out a commission against several members, part of the whole firm.

If a joint creditor sue out a joint fiat, he thereby binds himself to resort to the joint property only.[2] And where a fiat is issued against a trader, as "surviving partner" of another, this being deemed a joint fiat, the petitioning creditor will not be allowed to claim upon the separate property.[3]

Where a joint creditor takes out a separate fiat, which is rescinded for the purpose of proceeding under a joint fiat against all the partners, a right will be reserved to him to elect whether he will prove as a joint creditor, or as the separate creditor of the bankrupt against whom he sued out the fiat.[4]

Where there is no joint estate and no solvent partner.

SEC. 924. The general rule is not to be abandoned, so long as there is any joint estate, no matter how trifling.[5] In one case, the fact that the joint estate consisted merely of a few outstanding debts,[6] and, in

[1] Ex parte De Tastet, 1 Rose, 10.
[2] Ex parte Bolton, 2 Rose, 389.
[3] Ex parte Barned, 1 Glyn & Jam. 309.
[4] Ex parte Smith, 1 Glyn & Jam. 256; Ex parte Brown, 1 Rose, 433.
[5] The practice referred to in the text might seem to be repealed by the 6 Geo. 4, c. 16, s. 62, which enacts that, under a separate commission, a joint creditor, unless he be the petitioning creditor, shall not receive dividends out of the separate estate, until all the separate creditors have been paid. But see section 135 of the same act.
[6] Ex parte Leaf, 1 Dea. 176.

another case, that it was worth only 5*l.*, was held to be a complete bar to an application in behalf of the joint creditors against the separate estate.[1] And it seems that where two persons dissolve their partnership, and the remaining trader becomes bankrupt, it is not sufficient, in order to prove that there is no joint estate, to show that on such dissolution the out-going partner assigned to the remaining trader his moiety of the partnership effects.[2] On the other hand, Lord Eldon has said that if the joint property be of such a nature, and in such a situation, that any attempt to bring it within the reach of the joint creditors must be deemed a desperate, or, in point of expense, an unwarrantable attempt, that would authorize a departure from the rule.[3] And it has been held that joint effects, pledged for more than their amount, are not within the rule; the term joint effects meaning such as are under the administration of assignees to distribute.[4]

To bring a case within exceptions of this second class, not only must there be no joint estate, but there must be no solvent partner, that is, no partner possessed of any available fund;[5] for if there be a solvent partner, the creditor has his right of action against him.[6] But this reason does not apply where the solvent partner is dead; therefore, in such case, although the deceased partner's estate may be solvent, the creditor, if there be no joint estate, may prove against the separate estate of the bankrupt.[7] And so he may, where his debtors are not partners in trade, but merely joint contractors, on joint promissory notes, etc.[8]

Joint creditors who claim to prove against separate estates, on the ground of there being no joint property, must obtain an order for that purpose; but, having obtained such order, they may select any one of the separate estates of the bankrupts, against which to prove.[9] And even where the general partnership is subdivided into distinct minor firms, the creditors of the general partnership, there being no general joint estate, may prove against the estate of an individual partner, or against one of the minor joint estates, and in all cases, the estate so burdened is entitled to re-imbursement from the others.[10]

---

[1] In re Lee & Armstrong, 2 Rose, 54.
[2] Ex parte Appleby, 2 Dea. 482. *Sed qu.*
[3] Ex parte Peake, 2 Rose, 54.
[4] Ex parte Hill, 2 N. R. 191, (1); 1 Mont. Part. 113 App.
[5] Ex parte Janson, 3 Madd. 229, Buck, 227; Ex parte Sadler, 15 Ves. 52; Ex parte Crosfield, 2 Mont. & A. 543; 1 Dea. 405; overruling Ex parte Pinkerton, 6 Ves. 842, n.
[6] Ex parte Bauerman, 3 Deac. 476.
[7] Id.
[8] Id.
[9] Ex parte Willock, 2 Rose, 392.
[10] Ex parte Wylie, 2 id. 393; Ex parte Nolte, 2 Glyn & Jam. 295; Ex parte Machell, 1 Rose, 447.

Where there are no separate debts.

SEC. 925. The last exception to the general rule, namely, where there are no separate debts, occurs when the separate debts are so inconsiderable that the joint creditors undertake to pay them. In such case, the joint creditors may prove against the separate estate.[1] But a mere offer to pay the separate debts will not be sufficient without some proof before the court as to their amount.[2] Where, however, the separate debts were very small, and the joint creditors resided in Sicily, the court, without insisting on the usual undertaking to pay the separate creditors, gave them, in the mean time, liberty to make such proof as they might be able.[3]

It may be remarked in conclusion, that where a separate fiat issues against a partner who has given an equitable mortgage as a separate security for a joint debt, the court will order the security to be sold, but will not therefore permit the creditor to prove the difference against the separate estate of the bankrupt.[4]

As to interest.

SEC. 926. Generally, in the event of a surplus, creditors are entitled to interest for their debts, from the date of the fiat.[5] But where separate creditors are paid 20*s.* in the pound, and there is a surplus of the separate estate, that surplus shall not go immediately to pay interest to the separate creditors, but shall go to make the joint creditors equal with them as to the principal.[6] But all creditors shall receive interest before any partner, or assignee of a partner, shall be permitted to prove.[7]

The surplus of the joint estate must be apportioned between the respective estates of the partners, according to their equitable rights. Therefore, where a joint commission issued against a firm consisting of two partners, it was held that the separate creditors of one had a lien on the other's share of the surplus of the joint estate, in respect of a debt proved under bills drawn in the name of the firm for a sep-

[1] Ex parte Chandler, 9 Ves. 35.
[2] Ex parte Taitt, 16 id. 193; and see Ex parte Hubbard, 13 id. 424.
[3] Ex parte Basarro, 1 Rose, 266.
[4] Ex parte Loyd, 3 Mont. & A. 601; 3 Deac. 305.
[5] 6 Geo. 4, c. 16, s. 132; Ex parte Mills, 2 Ves. 195. As to the mode of calculating the interest in case of a surplus, see In re Higginbottom, 2 Glyn & Jam. 123. No interest, however, subsequent to the fiat, can be charged upon the estate directly or indirectly, except in case of a surplus. Ex parte Paton, 1 id. 332.
[6] Ex parte Reeve, 9 Ves. 590; Ex parte Clarke, 4 id. 677; Ex parte Boardman, Co. B. L. 198. The rule is not altered by the present Bankrupt Act. Ex parte Minchin, 2 Glyn & Jam. 287.
[7] Ex parte Reeve, *supra*; Ex parte Ogle, Mont. 350.

arate debt, and might come in with the separate creditors of such other, for the deficiency.[1]

The appointment is regulated on the same principle, where some of the partners are solvent. For if, upon the bankruptcy of one of several partners, all the joint creditors are satisfied, and, upon a balance of accounts, the bankrupt partner is indebted to the firm, the firm are entitled to full satisfaction of the debt out of the bankrupt's share of the surplus,[2] and to prove against his separate estate for the deficiency. Lord Eldon, in reference to the case of two partners, said, "If the surplus of the joint estate is not sufficient to pay all that is due from one partner to the other, he ought to come in with the separate creditors of the other."[3]

Where, after the bankruptcy of one partner, all the joint debts and all the separate debts, except those between the partners themselves, have been paid, and the surplus has been paid over to the bankrupt partner, the solvent partner is entitled to apply, by petition in the bankruptcy, for an account of such surplus, and for payment of his proportion of it, and the order may be made accordingly.[4]

If there is a surplus upon the separate estate of a bankrupt, who is a member of two firms, such surplus must be carried to each joint estate, in proportion to the amounts of the debts proved against each joint estate respectively.[5]

When partners may be creditors upon each other.

SEC. 927. After their demands are finally liquidated, partners may be creditors upon each other, but not before.[6] This subject will be treated of hereafter.

Enforcement of joint debts against estate of deceased partner.

SEC. 928. We have seen that, when one partner dies, and the survivors become bankrupt, the joint creditors of the deceased and surviving partners have a right to enforce payment of their debt against the deceased partner's estate. These creditors, therefore, have two funds to resort to, namely, that which is to be administered under the bankruptcy of the survivors, and that of the deceased partner. Now, although, generally, if A has a right to go upon two funds, and B upon one, having both the same debtor, A shall take payment from that fund to which he can resort exclusively, that, by those means of

[1] Ex parte King, 17 Ves. 115. See Ex parte Reid, *post*.
[2] Goss v. Dufresnoy, Davies, 371; Richardson v. Goodwin, 2 Vern. 293.
[3] Ex parte King, *supra*.
[4] Ex parte Lanfear, 1 Rose, 442.
[5] Ex parte Franklyn, Buck, 332.
[6] Per Lord Eldon, 9 Ves. 589.

distribution, both may be paid; yet, where they have not the same debtor, B can have no control over A for this purpose.

In the case, therefore, of the death of a partner, and the bankruptcy of his survivors, it is clear that the joint creditors of the deceased and surviving partners cannot be compelled to resort to the estate of the deceased partner, for the benefit of the fund under the bankruptcy, by persons who are the creditors of the survivors only. Therefore, where D & Co. were partners, and D died, and a commission of bankrupt issued against the survivors, and a bill was filed by the joint creditors of the old firm, for an account of D's assets, and for a decree to admit them to the benefit of his assets, after his separate debts should be paid; and then a petition was presented in the bankruptcy of the new firm, by the creditors of the new firm, with a view of having D's assets marshaled for their benefit, and, for that purpose, praying that the dividend under the commission might be ordered to be postponed, Lord Eldon held clearly that such a petition could not be supported.[1]

Of election of remedy.

SEC. 929. By the 6 Geo. 4, c. 16, s. 59, no creditor who has brought any action, or instituted any suit, against any bankrupt in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit.[2]

Hence, it appears that, in the case of a single debtor, the creditor cannot proceed both at law and under the bankruptcy, in respect of the same debt. But where there is more than one debtor, and the creditor takes the security of all—as he may bring actions and obtain execution against each of them severally, provided he have

[1] Ex parte Kendall, 17 Ves. 514.

[2] It is not necessary that there should be a formal discontinuance of the action or suit before the plaintiff proves his debt, for the proof itself operates as a discontinuance of the action or suit; Ex parte Wooley, 1 Rose, 394, 2 Ves. & Bea. 253; Ex parte Glover, 1 Glyn & Jam. 271; and, therefore, it has been holden that a creditor may tender a proof or claim, and is entitled to have the judgment of the commissioners upon his right to prove, before he discharges the bankrupt, or discontinues the action. Ex parte Frith, 1 Glyn & Jam. 165.

[3] And where a creditor, who is proceeding at law, presents a petition to the Chancellor to stay the bankrupt's certificate, and also impeaching the bankruptcy, and praying that if it should be found valid, he might be permitted to prove, by so doing he brings himself within the jurisdiction of the Great Seal, and will be enjoined from continuing his proceedings at law. Ex parte Bozannet, 1 Rose, 181; Ex parte Hardenberg, id. 204.

but one satisfaction, so he may prove the debt against each of them severally, under every fiat which may be issued against them.[1] Or, if some remain solvent, he may prove against the bankrupts, and bring his action against each of the solvent debtors.[2]

Lord Hardwicke illustrates these principles by reference to the rights of an obligee of a bond against the several obligors, and of the holder of a bill of exchange against the drawers, indorsers, and acceptors.[3] Let us apply them to the case where there are two or more debtors, and those debtors are partners.

It seems clear, that if a creditor take a joint and several security from a firm for a partnership debt, and part of the firm become bankrupt, he may treat his debtors either as joint or as several debtors. In the former case he may bring his action against all, and then the bankrupts may plead their bankruptcy, and execution may be had against the rest. In the latter case he may prove his debt against the bankrupts and bring a separate action against each of the others. But he cannot treat them as both joint and several debtors. Therefore, where A and B, partners, gave a joint and several bond to C, and B became a bankrupt, and C proved the bond under the commission against B, Lord Eldon held, that C could not, after such proof, bring his joint action against A and B. Lord Eldon said that though the holder of a joint and several security had it in his option either to proceed jointly or severally, yet the defendants had in this case elected to prove severally by proving the bond under the commission. They were, therefore, not at liberty to bring a joint action upon it, but must proceed against the solvent partner severally.[4]

Confined to the same debt.

SEC. 930. The observations which have just been made regarding election of remedy have been confined to the case of one and the selfsame debt. Where there are two debts arising from distinct contracts, it has been held that the creditor, having proved one under the bankruptcy, may afterward proceed at law for the other. For the act says: "That the proving or claiming a debt under a commission by any creditor shall be deemed an election by such creditor to take the ben-

[1] And he may prove under every fiat to the full amount, provided he receive dividends only to the amount due to him. Ex parte Bloxam, 6 Ves. 600. See Ex parte King, Co. B. L. 168; Ex parte Lee, 1 P. W. 782; Ex parte Crossley, 3 Bro. 287; Ex parte Martin, 2 Rose, 87.

[2] Gregory v. Hurrill, 1 Bing. 324.

[3] Ex parte Wildman, 1 Atk. 109.

[4] Bradley v. Miller, 1 Rose, 278. If, under these circumstances, an action be brought against the bankrupt conjointly with the solvent partners, the bankrupt may obtain an order to have his name struck out, or to be indemnified against the costs and consequences of its remaining. Ex parte Read, 1 Rose, 460.

S, if J S sue A and B severally he cannot sue them jointly, and on the contrary, if he sue them jointly he cannot sue them severally, but the one action may be pleaded in abatement of the other. Even this right of election is lost if the creditor, for the purpose of having a collateral security to the joint and several bond, takes a joint warrant of attorney upon which judgment is signed. In such case, the security of the bond is merged in the higher security of the judgment.[1]

The rule of election as propounded by Lord Talbot is reprobated by Lord Eldon, who, in reference to Ex parte Rowlandson, observed that he was not perfectly satisfied with that authority. "The reasoning," he said, "goes upon this, that a joint and separate action could not be brought at law. But surely the distinction is, then, that where a joint and separate bond is given, and another security several from each, there, as two actions might be brought, the rule in bankruptcy should be different."[2] So, on another occasion, Lord Eldon observed that in bankruptcy, for some reason not very intelligible, it had been said the creditor should not have the benefit of the caution he had used. He never could see why a creditor having both a joint and several security should not go against both estates.[3] The rule, however, as laid down by Lord Talbot is completely established.

It makes no difference whether the joint and separate security arises from the same or different instruments.[4] The rule also holds if there be only one instrument, as if there be a debt due from a partnership, and the creditor take the separate bond of one partner as a collateral security for the debt. In such case, the creditor must elect against which estate he will go. So, if, after the dissolution of a partnership, the creditor obtain from the remaining partners an acceptance in the name of the original firm, and both the original and remaining partners become bankrupt, the creditor may either prove against the estate of the original partners in respect of the original debt, or against that of the remaining partners in respect of the security, for the security, though void as to the original, is valid as to the remaining partners.[5]

In accordance likewise with this rule, if a bill be drawn by one of several partners upon the firm, or by the firm upon an individual partner, the holder of such security, if not ignorant, at the time of taking it, of the connection between the drawers and acceptors, must

[1] Ex parte Christie, Mont. & Bl. 352.
[2] Ex parte Bevan, 9 Ves. 223; see Ex parte Vaughan, cited 3 P. W. 206.
[3] 10 Ves. 109.
[4] 9 Ves. 225.
[5] Ex parte Liddiard, 2 Mont. & A. 87; 4 Deac. & C. 603.

elect whether he will prove against the joint estate or against the estate of the individual partner. In Ex parte Bigg,[1] C drew a bill of exchange upon H & Co., which they accepted. The firm of H & Co. consisted of C himself, and four others. Upon the bankruptcy of H & Co., the holders who had proved the bill against the joint estate in respect of the acceptance, sought to establish an additional proof against the separate estate of the drawer. The objection to the application was, that at the time of taking the bill, the holders were not ignorant that C was included in H & Co. Lord Eldo refused the application, considering that, under the circumstances, the petitioners had only a right to elect, and that they had made their election. His Lordship said: "Where the object appears to be to give the bill a character of respectability by such distribution of the names of a partnership, the court has said that the parties to such arrangement shall not avail themselves of it, against their knowledge of the method in which the obligation of the firm ought regularly to be created."

From this cause an inference might be drawn that where the holder of the bills is ignorant at the time he takes them of the partnership between the drawers and acceptors, he will be entitled to double proof, although the holders and acceptors are not in distinct partnerships, as well as in an aggregate partnership. Lord Eldon also in another case[2] appears to establish this inference; for he says, "In all the cases in which the holder has been allowed to avail himself of his security to the extent of its utmost liability, there has either been an ignorance of the union of the parties in one partnership, or a subdivision of them into distinct trading establishments." On the other hand, a learned writer seems to think that ignorance or no ignorance of the connection of the parties is not a question to be weighed in favor of the holder, in cases where the general partnership is not subdivided into distinct firms.[3] And this opinion seems to rest on a fair foundation; for, in another report of Ex parte Bigg,[4] it does not appear that Lord Eldon laid any stress upon the circumstance of the holder's being ignorant of the connection between the parties to the bill. On the contrary, he is there reported to have said, that "whatever might be the right of the holder of such bill without notice that the parties were the same, the present petitioner had such notice, and was not entitled to a double proof."

Upon the whole, it may be laid down, that where the drawers and

[1] 2 Rose, 37.
[2] Ex parte Bank of England, Rose, 82.
[3] Eden, B. L. 183, 184.
[4] 1 Mont. Partn. 180.

acceptors or indorsers of a bill together form a partnership, but do not also form distinct firms respectively, the holder of such bill must, in all cases, elect whether he will prove it against the joint estate, or against the separate estates of the several parties to the bill.

But the case is otherwise when the drawers and acceptors or indorsers of a bill together form a partnership, and likewise form distinct firms respectively.

Rule when debt has been converted with or without extinguishment.

SEC. 933. When a debt has been converted with extinguishment, it is obvious that the creditor can only prove it according to its new quality. But where it has been converted without extinguishment, the creditor may elect whether he will prove it according to its old or new quality. Therefore, where the creditor of a partnership took a joint and several bond from a firm, and afterward took a bill indorsed to him by the firm in part satisfaction of his debt, and the bill was proved under a commission against the acceptor, it was held that the creditor might prove under the bond, and, consequently, might proceed against either the joint or separate estate.[1] Upon the same principle, where a joint creditor took, as collateral security, a draft from a solvent partner,[2] and again, where a joint creditor took a separate bill for his joint debt,[3] it was held that he might elect to prove according to the quality either of the original or the converted debt. Similarly, where a separate creditor took a joint note, and again where a separate creditor took a joint bill,[5] it was held that he might elect in like manner.

Where debts have been adopted or converted without the creditor's taking a new security, but only giving his assent to the arrangement, that is, *à fortiori*, a conversion without extinguishment. And therefore, where a partnership agreed to consolidate their separate debts, it was held that a separate creditor who had assented might elect.[6] So, where the remaining partner agreed to take the joint property and pay the partnership debts, and the partnership was dissolved on these terms, and the trade was continued by the remaining partner, it was held that a joint creditor who had assented might elect.[7]

---

[1] Ex parte Hay, 15 Ves. 4.
[2] Ex parte Roxby.
[3] Ex parte Hodgkinson, *ante*.
[4] Ex parte Seddon, *ante*.
[5] Ex parte Lobb, *ante;* Ex parte Meinhertzhagen, *ante*.
[6] Ex parte Clowes, *ante;* Ex parte Apsey, 3 Bro. 265.
[7] Ex parte Freeman, *ante;* Ex parte Fry, *ante*.

When debt has been collusively converted.

SEC. 934. We have already observed that where a debt has been converted by a debtor, by means of collusion with his (the debtor's) copartners, the debt may be treated as joint or several. Therefore, where a partner held property as a trustee, and, with the knowledge of the firm, applied it to the use of the firm, it was held that the *cestui que trust* might prove against the joint estate, or against the separate estate of the trustee.[1] So, where a partner had money intrusted to him as assignee of a bankrupt, which, with the knowledge of his copartner, he applied to the uses of the firm, it was held that the sum so applied might be proved against the joint estate, or against the separate estate of the assignee.[2] But where a partner applied trust-money to the uses of the firm, without the knowledge of his copartner, it was held that the debt did not thereby become joint, and, therefore, that the *cestui que trust* was not entitled to elect.[3]

Where A employed B & C as his stock-brokers, and, for the purpose of more convenient transfer, allowed certain stock belonging to him to stand in the name of B alone, and B, without the knowledge of his copartner, sold the stock and paid the produce into the partnership funds, Sir L. Shadwell held that, upon the bankruptcy of B & C, A was entitled to prove against the separate estate of B, or against the joint estate of B & C.[4]

Rule when dormant and ostensible partners become bankrupt.

SEC. 935. Where a firm, consisting of a dormant and an ostensible partner, become bankrupts, it has been invariably held that a creditor who dealt with the ostensible partner, not knowing that he had a dormant partner, may prove either against the joint estate or against the separate estate of the ostensible partner.[5] And where there is a joint commission against A & B, as partners, but the

[1] Ex parte Watson, 2 Ves. & Bea. 414; Ex parte Heaton, Buck, 386. In such case the copartners who have notice of the appropriation of the trust-money to the use of the firm, become, constructively, trustees consenting to a breach of trust, and trustees commiting breach of trust are jointly and severally liable. Keble v. Thompson, 3 Bro. 112. Where A and B, trustees, lent trust-money to a firm of which A had been a member, B receiving indemnity for the loan from the *cestui que trusts*—upon the bankruptcy of the firm, and also of A, B was allowed to prove the whole sum lent against the estate of the firm; and one of the *cestui que trusts*, who, upon coming of age, indemnified B, but did not ratify the loan, was allowed to prove her share of the trust-money against the separate estate of A. Ex parte Beilby, 1 Glyn & Jam. 167.

[2] Smith v. Jameson, 5 T. R. 601.

[3] Ex parte Apsey, 3 Bro. 265.

[4] Ex parte Turner, Mont. & M'A. 255.

[5] Ex parte Norfolk, 19 Ves. 458; Ex parte Watson, id. 459; and see Binford v. Dommett, 4 id. 434; Ex parte Hamper, 17 id. 413; Ex parte Matthews, 3 Ves. & Bea. 125; Ex parte Hodgkinson, Coop. 101.

latter is a dormant partner, and the joint creditors have resorted to the separate estate of A, thereby diminishing A's separate estate, and exonerating the joint estate, so as to produce a surplus of it, the separate creditors of A have a lien upon that surplus to the extent that their funds have been diminished by the election of the joint creditors.[1]

When a demand may be split.

SEC. 936. Although it is a general rule that a creditor cannot split a demand, and prove part under the fiat, and proceed at law for the remainder;[2] yet, it seems, that where a demand against a partnership is secured, as to part of it, by a joint security, and as to the rest, by a joint and separate security, the creditor may prove the former part against the joint estate, and the latter part against the separate estate. In Ex parte Ladbrooke,[3] A, B, and C were partners. At the time of their bankruptcy, 27,620*l.* was due from them to their bankers, on a balance of account. Such balance was covered by joint promissory notes of the bankrupts, to the extent of 18,000*l.*, and also by a mortgage of some property belonging to A, with joint and several covenants from each of them for the payment of the whole balance. It was held, that the partners were entitled to pursue the joint liability of the bankrupts on the promissory notes, to the extent of the amount of those notes; in other words, to prove against the joint estate for 18,000*l.*; and that, with regard to the residue, after deducting the mortgage security, which fetched only $300, they were entitled to prove the ultimate remainder of $9,320 against the separate estate of A, by virtue of his several covenant.

Again, A, B, C, and D, partners, gave to their bankers a joint and several promissory note for 2,000*l.*, to secure future advances. When the advances had amounted to 1,950*l.*, A executed a separate mortgage to the bankers, to secure that sum and all future advances with a proviso, that such advances, together with the sum of 1,950*l.*, should not exceed 3,000*l.* The advances made to the partners considerably exceeded 3,000*l.*, and they afterward became bankrupt. It was held, on the authority of Ex parte Ladbrooke, that the bankers who had obtained repayment of the 3,000*l.* by sale of the mortgage security given by A, might prove the balance of the debt on the promissory note, against the separate estate

[1] Ex parte Reid, 2 Rose, 84.
[2] Ex parte Matthews, 3 Atk. 816; Ex parte Crinsoz, 1 Bro. 270.
[3] Glyn & Jam. 81.

of one of the other partners. In this case it may be remarked that on the execution of the mortgage the promissory note was not given up to be canceled, and further, that the bankers, on petitioning for liberty to prove, swore that the mortgage was intended to be an additional security to the promissory note.[1]

Conversely, where the separate debt of one partner is secured as to part of it by the joint security of the firm as sureties, the creditor may prove so much of the debt as is joint against the joint estate, and the residue against the separate estate of the debtor. As where A, on his marriage, covenanted to pay 4,000*l.* to the trustees of the settlement, of which 3,000*l.* was guaranteed by A's firm, and entered in the books accordingly, on the bankruptcy of the firm it was held that the trustees might prove for 3,000*l.* against the joint estate, and 1,000*l.* against the separate estate of A.[2]

Where a joint and separate creditor elects to go against the joint estate, he has no preference over the other joint creditors, upon the surplus of the separate estate.[3]

Of the time of election, and waiver of proof.

SEC. 937. In Ex parte Bond,[4] Lord Hardwicke ordered that the petitioners, who were joint and several bond creditors of the bankrupts, should have time to look into the accounts of the bankrupts' joint and separate estates, and see which would be most beneficial for them to come upon in the first place. And it has been determined that the party is entitled to defer his election until a dividend has been declared;[5] or at least until the assignees are possessed of a fund to make a dividend.[6] Lord Thurlow observed — "It is said to be the constant course for a joint and separate creditor to prove against both estates, and to elect at the dividend."[7]

In two early cases a creditor, who had received a dividend under the joint estate, was allowed to refund and claim under the separate estate; but when these cases were decided, the law as to election of proof was scarcely settled.[8] Under particular circumstances, however, a waiver of proof will be allowed at this time of day;[9] and that, although the party wishing to waive his proof has received dividends under it. Thus, if the party has not had the means of

[1] Ex parte Bate, 3 Dea. 358. Dissentiente, Erskine, C. J.
[2] Ex parte Hill, 3 Mont. & A. 175; 2 Dea. 249. See Ex parte Smith, 1 Dea. 385.
[3] Ex parte Bevan, 10 Ves. 107.
[4] 1 Atk. 98.
[5] Ex parte Clowes, Co. B. L. 261; Ex parte Husband, 2 Glyn & Jam. 4.
[6] Ex parte Butlin, Co. B. L. 259.
[7] Ex parte Bentley, 2 Cox, 218.
[8] Ex parte Rowlandson, 2 P. W. 405; Ex parte Bond, 1 Atk. 98.
[9] Ex parte Masson, 1 Rose, 159

knowing the state of the funds as between which he is allowed an election of proof, under such circumstances, even though he may have received dividends from one fund, he will sometimes upon refunding be permitted to prove against the other. No person, said Lord Alvanley, can be put to elect without a clear knowledge of both funds.[1]

In Ex parte Bolton,[2] joint creditors of A and B, partners, sued out a separate commission against each. Under the commission against A, they proved against the joint estate, and received a dividend. Afterward, under the commission against B, they proved their debt, and claimed to receive dividends against B's separate estate, offering to refund the dividend already received, with interest; with an affidavit, that when they received that dividend they were ignorant of their right to prove, if they thought fit, as the separate creditors of B. Lord Eldon allowed their claim. "No determination," said his Lordship, "approaches a case like the present. Here are two separate commissions at the instance of the same creditor. If it were the case of one separate commission thus awarded, the creditor might say, I will take my debt out of either the joint or the separate estate; but, to get at the joint estate, there must be a special order of the Chancellor. The joint property is, therefore, reached but by circuity; and being thus looked at, if the creditor says I will rank under the commission as against the joint estate, and so ranking receives a dividend, say to the extent of fifteen shillings in the pound, he still remains the creditor of the solvent partner as to the five, and for that he may bring his action, or he may take out a commission; and taking out a commission, until he completely knows, and which until then he only indirectly knows, the state of the joint accounts under that commission, he cannot be said deliberately to have elected. I think, therefore, he is entitled to reconsider his mode of proof, and, refunding the joint dividend with the interest, let the proof stand against the separate estate."

The case of Ex parte Bolton has been recently followed in Ex parte Law,[3] in which it was held that the receipt of a dividend from the separate estate of one of the bankrupts did not exclude the creditor from receiving a dividend from the joint estate, he being ignorant at the time of proof that he had no right to prove against both estates.

But waiver of proof is not to be allowed where it will disarrange the

[1] Whistler v. Webster, 2 Ves. 371. See Wake v. Wake, 1 id. 335.

[2] 2 Rose, 389; Ex parte Swanzy, Buck, 7.

[3] 3 Deac. 541.

proceedings which have already taken place in the bankruptcy. On a petition for this purpose, by persons who had proved as joint creditors, and wished to prove against the separate estates of the bankrupts, Lord Erskine made the order, but with the reservation that he would not allow any dividend of the separate estate already made to be disturbed.[1]

Similarly, where a creditor seeking waiver of his proof has signed the certificate of the bankrupt whose estate he declines, if the waiver would affect the certificate by reason of the great amount of the creditor's debt, or otherwise, then waiver will be refused. In Ex parte Borrodailes,[2] the partnership of A, B & C had been dissolved by the retirement of A, upon which event it was agreed that B & C should take upon themselves and pay the debts, and thenceforth be entitled to the stock and effects of the old partnership. After the dissolution the business was continued by B & C, who took possession of all the effects and paid most of the debts of the old partnership, and the petitioners continued to deal with them. Upon the bankruptcy of A, B & C, the petitioners, were advised to prove and did prove a debt of 6,927*l.* against the joint estate of A, B & C, but they were not at that time aware that they could elect between the estate of A, B & C, and the estate of B & C. They signed the certificate of A, B & C. The petitioners applied to withdraw their proof of 6,927*l.* made against the joinst estate of A, B & C, and that they might prove the same against the estate of B & C. But Lord Eldon dismissed the petition with costs.

On the other hand, where the creditor had signed the certificate of the bankrupt from whose estate he wished to withdraw proof, but it appeared that he had a separate debt to a small amount for which he was entitled to sign the certificate, and that the certificate was signed by creditors sufficient in value without his signature, under these circumstances Lord Eldon permitted the creditor to alter his proof.[3]

In the case just cited it was objected to the waiver of the proof, that the very next signature on the certificate, after that of the petitioner, was by the Bank of England for 16,000*l.*, and that as it was a general rule of the bank not to sign unless the assignee signed, and the petitioner was an assignee, his signature must have influenced that of the bank. Lord Eldon, however, seems not to have regarded this objection.

---

[1] Ex parte Beilby, 13 Ves. 70.
[2] 1 Mont. Part. 129, App.
[3] Ex parte Atkinson, 1 Mont. Part. 207.

Nevertheless, the signature of a bankrupt's certificate by an influential person must of necessity have considerable weight with other creditors. If, therefore, such person, after having signed the certificate, and having, by his example, induced others to sign, be permitted to waive his proof, it seems difficult to say that such a permission might not, in many cases, materially affect the interest of third persons. Now it has been laid down by Sir John Leach that where a creditor has done acts by virtue of his proof which may affect the interest of others, he cannot retract his proof. In the same case his Honor held that the petitioner having signed the certificate, might, under the circumstances, have influenced others to sign, and was therefore an act affecting the interest of others, and, accordingly, be refused to allow waiver.[1] It seems clear, therefore, that when a creditor has signed the bankrupt's certificate, and the fair presumption is that his signature has influenced that of others, he will not be permitted to waive his proof.

In one case the being a party to a petition in the character of a joint creditor was held to be an objection to waiver of proof. But Lord Eldon, on appeal, held the contrary.[2]

Of double remedy.

SEC. 938. Although, generally, where a creditor holds the security of the firm, and likewise that of individuals composing the firm, he must, upon the bankruptcy of some of them, elect whether he will consider them his joint or his separate debtors, and proceed accordingly; yet this rule is not without exceptions. For, where a creditor holds the security of a firm, and also of some of its members, and the latter likewise form a distinct partnership *inter se*, there are cases where the creditor may have a double remedy. Thus, where A, B, C and D trade under the firm of A, B & Co., and C and D are in a distinct partnership, and the firm of A, B & Co. draw bills upon C and D, who accept them, the holder of such bills may prove them under the bankruptcy of C and D, and afterward bring his action on the bills against A, B & Co.[3] So, if a creditor of A and B take out a commission against A, and receive a dividend under that commission out of the joint estate, it has been ruled that he may bring an action against the other partner for the residue.[4]

We have seen, also, that the mortgagee of a partnership, if he elects

[1] Ex parte Solomon, 1 Glyn & Jam. 25.

[2] Ex parte Husband, 5 Madd. 421; 2 Glyn & Jam. 4.

[3] Ex parte Parr, 1 Rose, 76.

[4] Heath v. Hall, 4 Taunt. 326; Young v. Hunter, 16 East, 258.

to prove under the bankruptcy, must give up his security, and prove the whole debt, or have the security sold, and prove for the amount of the difference. But, as the rule is that the deduction of a security is never made in bankruptcy, except when it is the property of the bankrupt, it has been held as a consequence of this rule that, in the case of a separate mortgage made for a joint debt, the security may be retained, though the whole debt be proved under the commission. In Ex parte Parr,[1] the petitioners were holders of bills of exchange drawn by persons at Demerara, under the firm of A, B & Co., and accepted by C and D, who were in the firm of A, B & Co., but likewise carried on a distinct partnership at Liverpool. The acceptors being unable to take them up, the petitioners resorted to the drawers, who, instead of satisfying the bills, assigned to the petitioners a plantation in South America, as a security for the balance due upon the bills, and the interest. A joint commission of bankrupt having issued against C and D, the petitioners applied to prove the amount of the bills and interest; but the commissioners refused to admit their proof without deducting the value of the security. A petition was then presented to the Lord Chancellor to the same effect, and the claim of the petitioners was allowed. Lord Eldon: "The deduction of a security is never to be made in bankruptcy but when it is the property of the bankrupt; it is said that it must be so considered in this case, as the house in Demerara and that in Liverpool were partners; but it is quite familiar that the same firm may be in one character drawers, and in another acceptors; and the question whether the mortgage is the property of the firm must be met in another way. The commissioners must call another meeting; the petitioners to prove without deducting their security."

Again, in Ex parte Peacock,[2] A and B, partners, being largely indebted to C, executed to him a joint bond to secure the amount of the sums due. As a farther security to C, A alone executed a mortgage to him of certain freehold and copyhold premises. A died, and a commission of bankrupt issued against B, as surviving partner of A. Lord Eldon held that C might prove the whole debt against the joint

[1] 1 Rose, 76. Generally speaking, in the administration of the bankrupt laws, A, a trader, and A and B, joint traders, are considered as much distinct as A and X. This appears not only from the cases mentioned in the present section, but from Ex parte Chuck, *ante*, from which it seems clear that which A may be reputed owner of property of A and B are the real owners; see, however, an exception to this rule in the ensuing section.

[2] Ex parte Peacock, 2 Glyn & Jam. 27; Ex parte Bowden, 1 D. & C. 135; Ex parte Smyth, 3 Dea. 597.

estate of A and B, without giving up his security on the separate estate of A. The separate estate, he said, could only be considered as security for the joint estate. So, in a more recent case, A and B, partners, being indebted to C in 10,000*l.* on bills, A alone assigned to a trustee for C certain debts and other securities belonging to A. Under these securities the sum of 8,414*l.* was received by C's trustee. On the bankruptcy of A & B, it was held that C might prove for 10,000*l.*, without deducting the 8,414*l.* from the proof.[1]

The case of Ex parte Connell,[2] lately decided by the Court of Review, is at variance with the preceding authorities. In that case, A and B, partners, had shares in a joint-stock bank. By the deed establishing the bank, it was provided that all debts due to the company from any proprietor on any account should be the first lien and charge on the shares of such proprietor; and it was declared unlawful for two or more persons to hold shares jointly. Notwithstanding this last-mentioned provision, A and B agreed that their shares should be partnership property, and they dealt with them accordingly, although the shares stood in their separate names. A and B became largely indebted to the bank on their partnership account, and afterward became bankrupts. The bank then petitioned to prove the debt against the joint estate, without giving up or selling the shares, or having the value deducted from the joint proof of debt; but the Court of Review dismissed the petition. It appears, however, that Cross, J., dissented from the opinions of the other judges, and it cannot be denied that his judgment is founded on very satisfactory reasoning.[3]

But notwithstanding this decision, it seems clear upon the other authorities which have been mentioned that a separate security by way of pledge or mortgage, for a joint demand, does not diminish the claims of the creditor as a joint creditor; and that, consequently, his security is twofold. But a joint security given for a demand against the partnership does diminish the creditor's right of proof to the extent of the value of the security. Therefore, where goods in which the bankrupts were jointly interested were pledged with a creditor to secure the payment of an acceptance of the bankrupts, and part of the proceeds were received by the creditor before he applied to prove, it was held that he must deduct the amount so

[1] Ex parte Adams, 3 Mont. & A. 157; Ex parte Groom, 2 Deac. 265.

[2] 3 Dea. 201; 3 Mont. & A. 581. See Ex parte Bowden, 1 D. & C. 135.

[3] The other judges seemed to rely on the rule in Ex parte Rowlandson, *ante*, which, however, was not a case of lien.

received before he could prove on the acceptance.[1] And, of course, a security for a separate demand does not extend to secure a joint demand. Where, therefore, a partner deposited title deeds in his own name, as a security for any payments or guaranties which the creditor should make for that partner, and, upon the faith of the deposit, the creditor negotiated and guaranteed the payment of the bills of the firm, it was held that the security was separate only, and did not extend to guarantee the creditor against his liability on the bills.[2]

Of double proof.

SEC. 939. Where the parties to an instrument are partners, and a creditor is permitted to prove against them, according to, and to the full extent of their respective liabilities, as apparent on the face of the instrument, without regard to the connection subsisting between them, such mode of proof may be designated as double proof.[3]

The leading case on this subject is Ex parte La Forest.[4] There, Corson and Gordon, partners and turpentine manufacturers, entered into partnership with Whincup and Griffin, soap manufacturers. The latter business was carried on under the firm of Whincup & Griffin. A joint commission issued against the four, under which they were found bankrupts, and the assignees possessed themselves of the joint fund of the four, and also the joint fund of Corson and Gordon, and their respective separate estates. Corson and Gordon, in their partnership firm, drew bills of exchange upon the firm of Whincup & Griffin, who accepted such bills. The petitioners discounted many of these bills. The petitioners alleged that, at the time of such discount, they were ignorant of any partnership existing between the four, but that they considered Corson and Gordon, the drawers, and Whincup and Griffin, the acceptors, as two distinct firms, and thought that they had the security of the funds of both those firms. The petitioners applied to the Commissioners to be admitted to prove against the respective joint estates of Corson and Gordon, and of Whincup and Griffin; but the Commissioners refused, conceiving that the bills ought to be proved only against the joint estate of Whincup, Griffin, Corson and Gordon. Lord Loughborough held

[1] Ex parte Prescott, 4 D. & C. 23.
[2] Ex parte Freen, 2 Glyn & Jam. 246.
[3] It is laid down by Mr. Cooke, in relation to double proof, that where the same persons are concerned in several firms, and issue bills on which the names of the respective firms stand as drawers, indorsers, or acceptors, a party taking such bills, conceiving them to be distinct houses of trade, may prove against each other. Co. B. L. 261.
[4] Co. B. L. 261.

that admitting the allegation of ignorance on the part of the petitioners to be true, they were entitled to the proof which they required.[1]

Again, A, B and C were partners in a cotton manufactory, and B and C carried on a distinct trade in partnership as grocers. The petitioner sold goods to B and C as grocers, for which they remitted to him a bill drawn by A in their favor upon one Z, and indorsed by B and C. Z accepted the bill, but it was protested for non-payment. The drawer, indorsers, and acceptor, all became bankrupts. The petitioner did not know that A had any connection in trade with B and C. Lord Loughborough ordered that the petitioner should be at liberty to prove the amount of the bill against the joint estate of B and C, and also against the separate estate of A, and be paid dividends upon both estates.[2]

Again, five persons, trading under the firm of C & Co., drew a bill of exchange on two of the members of the copartnership, who carried on a distinct trade as H and G. The bill was accepted, negotiated, and, in the course of circulation, came into the hands of the petitioner without any knowledge on his part of the connection between the parties. Upon the bankruptcy of C & Co., the petitioner claimed to prove both against the drawers and acceptors. Lord Eldon held that the petitioner, as ignorant of the connection of the parties, was entitled to such proof.[3]

In all these cases, the partners, who appeared as distinct parties to the bills, were also in distinct partnerships; and yet, the holders of the bills, in order to obtain double proof, were required to prove their *ignorance* that these distinct partnerships also formed an aggregate partnership. Nevertheless, according to a learned writer,[4] Lord Eldon has determined, that where the firms are in fact distinct, it is not material that the ignorance of the holder that the same parties were also united in one firm, should be requisite to entitle him to

[1] His Lordship accordingly ordered the Commissioners to inquire, by examination of the respective parties upon oath, and otherwise, whether the petitioners, or either of them, at the time of their respectively taking the respective bills of exchange and promissory notes in the petition mentioned, knew that Alexander Corson and James Gordon, and Whincup and Griffin, were concerned and engaged in one partnership, carried on under the firm of Whincup and Griffin, or not. And if the petitioners knew of such partnership, then they were to be at liberty to apply to the court, as they should be advised, for further directions; but if the petitioners did not know of such partnership at the time of their receiving the said bills of exchange and promissory notes, of which they were respectively possessed, then such of the petitioners as did not know of such partnership, were to be admitted to prove against the respective joint estates of Corson and Gordon, and of Whincup and Griffin, and to receive dividends therefrom with the other creditors.

[2] Ex parte Benson, Co. B. L. 263.

[3] Ex parte Adam, 2 Rose, 36.

[4] Eden, B. L. 183.

proof. Now, although this remark does not seem to be supported by any express authority, yet it is justified by several *dicta* of Lord Eldon, and by the case of Ex parte Walker,[1] which is in point. There A, a sole trader, B and C, partners, and D, also a sole trader, engaged in a joint adventure, and for a joint purchase of goods by them, the vendor, *with a knowledge of their joint interest*, received in payment a bill drawn by A on, and accepted by B and C. Lord Eldon held that on the bankruptcy of A, and of B and C, the vendor was entitled to prove the bill against both their estates. On other occasions, likewise, Lord Eldon appears to have adverted to double proof, without ever referring to the ignorance of the holder of the double security, that the distinct firms constituted one general firm.

On the other hand, there is a recent case in which Sir George Rose is reported to have said that the holder of a bill is not entitled to double proof if he knew the different persons whose names appear upon it to be all members of one joint firm.[2]

Upon the whole it seems still open to contend that where a bill is drawn by some of the partners upon the others, or upon the whole firm, or *vice versa*, and the bill purports and the fact is that the drawers and acceptors likewise constitute distinct firms respectively, in such case the holder, whether ignorant or not of the aggregate connection of the parties, is entitled to pursue the contract appearing on the face of the bill, and to prove against both the estate of the drawers and that of the acceptors.

Limitations as to double proof.

SEC. 940. But a creditor cannot be permitted to avail himself of double proof to the extent of proving against the joint and separate estate of the same individual. Thus, A carrying on business on his separate account, and also in partnership with B, gave a bill of exchange drawn by himself payable to the order of A & B, and indorsed by them. A separate commission issued against A; B died. The holder of the bills having proved them against the separate estate of A, and having afterward learned that distinct accounts were to be kept of the estates of A & B, applied to be at liberty to prove against the joint estate of A & B, in addition to his proof against the separate estate of A. But Lord Eldon only gave him the election either

[1] 1 Rose, 441.
[2] Ex parte Bonbonus, 8 Ves. 546; Ex parte Bank of England, 2 Rose, 83.
[3] 2 Deac. 261.

to retain his present proof, or to withdraw it and prove against the joint estate.[1]

So, in Ex parte Liddel,[2] A, B & C carried on business in partnership under the firm of A & Co. K, in ignorance that C was in the firm, took from them a bill of A & Co., drawn upon and accepted by C. A & Co. having become bankrupts, and B being a minor, separate commissions issued against A & C. Under each of these commissions K proved as a joint creditor, and received a dividend out of the joint effects. He was then permitted by the commissioners to prove against C's separate estate in respect of the acceptance. But upon a petition by the assignees of C, praying that this proof might be expunged, Lord Eldon ordered according to the prayer, observing that the creditor had made a conclusive election, that having adopted the aggregate liability of all his debtors, he was excluded from resorting to them individually.

Again, in a case[3] where A, B & C, partners, indorsed a bill over to C, who was also a distinct trader; upon their bankruptcy Lord Eldon refused to allow the Bank of England, who had discounted the bill, to prove against both estates. His Lordship said, that unless this case could stand upon the circumstance of C being a distinct trader, it could not stand at all, and that circumstance resolved itself into nothing more than a resort to his separate estate, which, resorting at the same time to the joint estate, a creditor was not entitled to do in bankruptcy. The petitioners, therefore, must elect.

The more modern case of Ex parte Husband[4] appears to have been decided on the same principles. There, A & B being partners, the latter a dormant partner, A, on the partnership account, drew bills in his own name on B, who accepted them. A & B having become bankrupts, Lord Eldon held that the holder of these bills, who was ignorant of the partnership, was not entitled to prove them against the joint estate of A & B, and the separate estate of B, but that he might elect to prove them against the joint estate of A & B, or the separate estates of A & B. "It is clear," said Lord Eldon, "that where a party takes a bill, drawn by some members of a firm, carrying on a distinct trade, on the firm, in ignorance that the drawers constitute part of the firm of the acceptors, proof is admitted against both the drawers and acceptors, and it is equally clear that a person

[1] Ex parte Masson, 1 Rose, 159.
[2] 2 Rose, 34.
[3] Ex parte Bank of England, 2 Rose, 82; in Ex parte Kirby, Buck, 511, this mode of proof was allowed by the commissioners and disallowed by the Chancellor, but apparently on other grounds.
[4] 2 Glyn & Jam. 4.

holding a joint and separate security for the same debt, is in bankruptcy bound to elect. In this case, however, the bills are accepted by the dormant partner of the partnership of A & B, carrying on business under the name of A, and are drawn by A in his individual name indeed, but, as I take it on the evidence, in his name as representing the firm of the two bankrupts. It does not appear to me that this case ranges itself within that class of cases in which, contrary to the ordinary rule in bankruptcy, the holder has been allowed to pursue the contract appearing on the face of the bills, and to have double proof."[1]

The preceding observations were written before the case of Ex parte Moult[2] was argued before the Court of Review. There, Williams, Deacon & Co. were holders and indorsees for value of two bills of exchange at three months. The bills were drawn by Barrow & Co. upon, and accepted by Johnston & Co. They were indorsed by the drawers to Geddes & Co., and by them to Radcliffe & Co. Barrow & Co. were commission agents at Manchester, and that business was carried on by Barrow and Geddes. The firm of Johnston & Co. carried on business as warehousemen in London, and that business was conducted by Johnston and Geddes. The firm of Geddes & Co. carried on business as cotton manufacturers at Stockport, and that business was conducted by Geddes alone. The firm of Radcliffe & Co. carried on business as cotton-spinners at Chester, and that business was carried on by Geddes and Radcliffe. Williams & Co., at the time of taking the bills, were ignorant that Geddes was a partner with Barrow & Co. In September, 1828, a joint commission of bankrupt issued against Barrow & Geddes, and in October following, a commission was sued out against Johnston & Co. In November of the same year, Williams & Co., being the holders of the two bills, proved them under Johnston & Co.'s commission, under which dividends had been declared to the amount of 2*s.* 8*d.* in the pound. In 1830, Williams & Co. proved the same bills under the commission against Barrow & Geddes; *first*, against the joint estate of Barrow & Geddes for the

[1] It is to be observed, however, that a case of this nature could scarcely arise again. For, in pursuance of the doctrine laid down in Smith v. Watson, the estate of A would comprehend the joint chattels of A & B, B being a dormant partner.

[2] Mont. 337; 1 D. & C. 44. On appeal, Mont. & Bl. 28; 2 Dea. & C. 419. Before the decision in Ex parte Moult had settled the law on this subject, dividends had sometimes been received upon principles at variance with that decision. In a case where seven years had elapsed since a dividend, inconsistent with Ex parte Moult, had been received, the Court of Review refused to order the party to refund, but made a prospective order. Ex parte Soper, 1 Mont. & A. 55; 4 D. & C. 569.

whole amount; and, *secondly*, against the separate estate of Geddes for the amount minus the dividends declared under Johnston's commission. This proof being allowed by the Commissioners, the assignees of Barrow & Geddes appealed from that decision, and prayed that Messrs. Williams & Co. might be ordered to elect before the Commissioners whether they would remain creditors of the joint estate of Barrow & Geddes, or of the separate estate of the latter. The Judges of the Court of Review were divided in opinion upon this important question, Erskine, C. J., and Rose, J., being of opinion that the double proof was inadmissible, and that the creditor must elect; the other Judges, on the contrary, being in favor of the double proof. On appeal to Lord Brougham, C., his Lordship, on the authority of Ex parte Husband, affirmed the judgment of the two Judges who were against the double proof.

It is difficult not to think that the question agitated in Ex parte Moult was long ago virtually concluded, if not by many *dicta* and some few decisions, at least by the leading principle which guides the administration of the bankrupt laws. But, however that may be, the case of Ex parte Moult may now be considered as a decisive authority on this subject.

The principles of that case and Ex parte Husband have been carried still further, if possible, in a case Ex parte Chevalier.[1] There V & Co., who carried on business in partnership, as merchants in the Brazils, drew a bill upon V, one of the partners, who traded on his own account in England. The bills were made payable to the agent of the government of the Brazils, and were accepted by V. They were not paid. Process of insolvency afterward issued against the foreign firm, and a commission issued against the English partner. It was held, that the agent, though he might prove under the commission, yet must be restrained from receiving dividends, unless he elected not to prove under the insolvency abroad.

Of proof between partners.

SEC. 941. A debt due from one partner to another on the partnership account is provable under a commission against the debtor partner, for, in this case, the creditor stands in the situation of "a surety, or person liable for the debt of the bankrupt, and who has paid the debt."[2] The debt so provable will bar the bankrupt partner's certifi-

[1] I Mont. & A. 345.

[2] 6 Geo. 4, c. 16, s. 52; Ex parte Watson, 4 Madd. 477; Wood v. Dodgson, 2 Mau. & Selw. 195; Affialo v. Fourdrinier, 6 Bing. 309.

cate, but the solvent partner can only prove under certain restrictions.

Thus, first, it is a settled rule that a solvent partner cannot prove under a commission against his copartner, so as to come in competition with the creditors of the partnership, that is, he has no right to receive any portion of his debt, until all the creditors of the partnership are paid 20*s.* in the pound, as well as all interest due upon their respective debts subsequent to the date of the commission. The above rule is founded on this plain principle of reason and justice, viz., that a partner who is himself liable to all the creditors of the partnership ought not to take away any of the funds before all the creditors (to whom he is so liable) are duly paid.[1]

Again, a solvent partner cannot prove against his copartner in competition with the separate creditors, unless the joint creditors are first paid. For, if the dividend were reserved to him on such proof, the joint creditors might be injured by the partner stopping *in transitu*[2] the surplus of the separate estate, which would otherwise be carried over to the joint estate; or the separate creditors might be injured by their funds being stopped prospectively, upon the faith of the partner being afterward able to pay the joint debts.

In order to admit the proof of one partner against another, it is likewise necessary that the partnership debts should have been *bona fide* satisfied, either by payment of the whole or of part in discharge of the whole.[3] Therefore, although there have been cases to the contrary,[4] it is not sufficient, in order to enable the solvent partner to prove against the bankrupt partner, that the former should indemnify the estate of the latter against the joint debts. This was decided in Ex parte Moore.[5] There, A and B were in partnership as bankers at Boston, then A, B and C were in partnership as bankers at Spilsby. A commission of bankrupt having issued against the Boston bank, a large debt was proved against that firm by the Spilsby firm, and a dividend received thereon. After receiving these dividends, and getting in all the good debts, there was still a deficiency of assets in

[1] Deac. B. L. 664; Ex parte Reeve, 9 Ves. 558; Ex parte Ogle, Mont. 351; Ex parte Burrell, Co. B. L. 505; Ex parte Broome, 1 Rose, 69; Ex parte Rawson, Jac. 277; Ex parte Robinson, 4 D. & C. 499; M'Owen v. Hunter, Drury & Wash, 847 (Irish).

[2] But, where the solvent partner has possession of the goods, he cannot be sued by the assignees of the bankrupt partner for the bankrupt's share of the goods, until they first satisfy all that is due from him to the partnership. 8 Barn & Cres. 618.

[3] Stat. 6 Geo. 4, c. 16, s. 52.

[4] Ex parte Ogilvy, 2 Rose, 177; Ex parte Taylor, id. 175; Ex parte Stoveld, 1 Glyn & Jam. 303.

[5] 2 Glyn & Jam. 166.

the Spilsby firm to the amount of 29,841*l.* 3*s.* 2*d.* Of this deficiency, C, by his petition, alleged that he had already paid or secured to be paid 16,668*l.* 17*s.* 3*d.*, and had the further sum of 2,450*l.* applicable to the same purpose. He, therefore, petitioned, B being insolvent, to prove a portion of such deficiency against the estate of A. Sir John Leach having allowed the petitioner's claim, upon appeal to Lord Eldon, the order was reversed. Lord Eldon, "I cannot get rid of the difficulty which the act of Parliament has interposed. That proof may be made by surety paying after the bankruptcy is clear, whether he pay the whole debt or part in discharge of the whole, but I cannot bring myself to think that the petitioner is within either alternative, or that there has been in this case any thing more than payment of part as part only. Of what consequence is it that he has given an indemnity? The meaning of the act clearly is that two persons shall not stand upon the proceedings in respect of the same debt, and, if the indemnity have not expunged from the proceedings, to all substantial purposes, the name of the original creditor, then the person giving indemnity does not come within the meaning of the act, as a surety or person liable to paying the debt, or paying part in discharge, or making an engagement which is accepted in discharge of the debt. I say, that till indemnity is given, which is accepted by every joint creditor as a discharge of the debt, a partner never can, according to my present notion, be considered as a person liable, paying the debt, or part in discharge of the debt, within the meaning of the act, and till he fills the character there designated he cannot prove."

It appears that in this case of Ex parte Moore, the very fact of admitting the solvent partner's proof against the separate estate would have enabled him instanter to pay all that remained due to the joint creditors,[1] a circumstance which shows the strictness of the rule in question. And, in a subsequent case, it was held that a solvent partner cannot even enter a claim against the separate estate, before payment of the joint debts. In Ex parte Carter,[2] one of several partners sold out stock to a large amount, and advanced the proceeds to the firm. The loans were secured by two joint bonds executed by the other partners. The lender died, and at the time of his death there was due to his estate the money secured by the bonds, and also a large sum upon an account current. The executors filed a bill against the surviving partners for an account and a receiver; but,

[1] See 2 Glyn & Jam. 237. [2] Id. 233.

pending the suit, the surviving partners became bankrupts. The executors then petitioned to prove the amount secured by the bonds, as also to enter a claim for the whole amount due to them against the separate estate of one of the partners, there being no joint estate. Sir John Leech directed the proof as prayed. Lord Eldon, however, overruled this decision on the same grounds on which he decided Ex parte Moore. "It is clear," he said, "that the deceased partner's estate being liable, has neither paid the whole nor part in discharge of the whole debt, and an undertaking to pay, I was too well satisfied in Ex parte Moore, was not sufficient. Nor do I see, in principle, how the entering a claim differs from the establishing a proof, since it operates just as effectually in interrupting the payment of the creditors, and if it interrupts the payment of the creditors, it is equally an interference with their rights, whether the dividends be received by the surety in the first instance, or paid into the bank in trust for him. To this conclusion I have been compelled to come, nor can I conceive how the commencement of a suit in equity before the bankruptcy can make any difference as regards the rights of the creditors."

The preceding cases were followed by that of Ex parte Ellis.[1] There A, B, C, and D, were partners. In January, 1826, D retired, taking a bond for what was due to him from the firm. It was agreed, however, that D's name should continue in the firm till the 1st January, 1827. In the middle of 1826, B and C retired, and gave notice of their retirement. From this period A conducted the business for his own benefit alone, but in the name of A and D, and contracted various debts for which D became jointly accountable. In June, 1827, A became a bankrupt. D then applied to prove the bond and interest, and that the commissioners might be directed to ascertain the amount of the debts for which the petitioner was liable jointly with the bankrupts, with liberty to the petitioner to enter a claim for the amount, and to prove and receive dividends upon such debts as he should pay, or against which he should indemnify the bankrupt's estate. But Lord Lyndhurst dismissed the petition on both points, observing that, for the purposes of proof, the petitioner must be looked upon as a partner, since he had authorized the use of his name as such. And, therefore, that until he should produce a discharge from the joint creditors, he could receive no relief.

Upon the whole, therefore, the general rule is very strict, that no solvent partner can prove against the estate of his bankrupt copartner

[1] 2 Glyn & Jam. 312.

without having first *bona fide* discharged all the joint debts. Moreover, as between such solvent partner and the joint creditors, interest must be included in the joint debts, and, therefore, no partner will be permitted to prove until interest as well as principal shall have been paid on such debts.[1]

Qualification of the rule.

SEC. 942. But the general rule in question, like all other general rules, is qualified in cases of necessity. Therefore, when the solvent partner, without his own default, is unable to procure a discharge from every joint creditor, as for instance, where one of the joint creditors is a lunatic, in such case, it seems, he will be permitted to prove against the separate estate upon giving security for the debt which cannot be discharged, and paying the residue of the joint debts.[2] There are some cases, also, where, notwithstanding that the retiring partner has not paid all the demands of the partnership, he has been permitted to prove against the joint estate, on the ground of the joint creditors having assented to the arrangements made between the retiring and remaining partners, or being barred by length of time from objecting to the retiring partner's proof. Thus, where a partnership had been dissolved upon the terms of the retiring partner taking a security from the remaining partner for the balance due to him, and the remaining partner was treated by the joint creditors as their sole debtor, and he afterward became bankrupt, it was held that the retiring partner might prove his debt against the separate estate of the bankrupt, although some of the partnership debts were unpaid.[3] In this case it may be remarked that the retiring partner had been a dormant partner.

So, where, upon the death of one of three partners, his executors carried on the trade with the surviving partners for a twelvemonth, and then dissolved the partnership, upon which occasion the two continuing partners gave the executors a bond, to secure the balance due to them, and more than six years afterward the two became bankrupt, it was held that the executors had a right to prove the amount of the bond against the joint estate of the two continuing partners.[4]

Again, where a person on the eve of bankruptcy induces another by fraudulent means to become his partner, and the latter advances capital to the concern, a case might be stated where the latter would

[1] See Ex parte Ogle, Mont. 350.
[2] Ex parte Young, 3 Ves. & Bea. 33.
[3] Ex parte Grazebrook, 2 D. & C. 186.
[4] Ex parte Hall, 3 Dea. 125.

be allowed to prove the amount of the capital so advanced, *pari passu*, with the separate creditors of the bankrupt. However, such proof will not be allowed where the person defrauded has held himself out to the world as a partner, though only for a short time. In Ex parte Broome,[1] A, in consideration of a premium, took B into partnership with him, and guaranteed to him a profit of 400*l.* per annum. Shortly after the partnership began, B ascertained that A was insolvent, and that he had formed the partnership merely to retrieve his affairs, which were desperate. B then filed a bill for the purpose of having the partnership declared void on the ground of fraud. A receiver was ordered upon a motion in this suit. Afterward A became a bankrupt. B petitioned to prove the premium and receive a dividend with the other creditors of A. Lord Eldon expressed himself at first inclined to grant the prayer of the petition, provided the petitioner would abandon the suit in equity and the receiver, but took time to consider. Afterward (observing that although the petitioner might have an equity to be considered as never having been a partner, yet that it was extremely difficult to say that, as to third persons, he was not a partner), his Lordship made an order that the petitioner should be at liberty to enter a claim only for the amount of his demand, but not to prove with the separate creditors.

Exceptions of a special nature.

SEC. 943. The exceptions mentioned in the preceding article are of a very special nature, and can seldom occur to relax the general rule; but, where one of several partners becomes bankrupt, being at the time of his bankruptcy indebted to the partnership, the solvent partners, upon discharging all the partnership debts, though after the bankruptcy, may prove *pari passu* with the separate creditors of the bankrupt, in respect of the debts so owing to the partnership.[2]

In Ex parte Young,[3] A, B, and C, being in partnership, C fraudulently borrowed money and drew bills in the partnership name for his private use. C afterward absconded, and a commission of bankrupt was issued against him, under which he was declared a bankrupt. After the bankruptcy, A and B paid all the joint debts, including those so fraudulently contracted by C. Lord Eldon held that they were entitled to prove the amount of the latter debts under the commission against C, in competition with his separate creditors. "It has been objected," said his Lordship, "that the proof cannot be admitted,

[1] 1 Rose, 71.
[2] Ex parte King, 17 Ves. 115.
[3] 2 Rose, 40; 3 Ves. & Bea. 31.

because thereby the solvent partners are admitted to prove in competition with their creditors. In the case, as it now stands, there is no such competition; all the partnership creditors have been paid; and although they have been paid after the bankruptcy, yet the effect is the same; the proof will not be in competition with them. The bankrupt's estate, it has been insisted, must, by the rules in bankruptcy, go exclusively to his separate creditors; but in every fair and equitable understanding of the respective situations of the parties, are not the solvent partners to be considered as his separate creditors? In bankruptcy, the administration of the estate is both legal and equitable. Prior to the bankruptcy, the solvent partners might have filed their bill to compel the bankrupt to pay that money which he had so misapplied, and how is that equity shaken by the bankruptcy? Although the two solvent partners, impeded by the technical form of legal proceedings, could not have maintained an action against the bankrupt, yet, undoubtedly, upon equitable principles, the bankrupt was a trustee for, and accountable to them, and a court of equity would have taken care to modify its equitable remedy, unshackled by the formal impediments of law. The bankruptcy, embracing equitable as well as legal principles, leaves that remedy unaffected." His Lordship proceeded to show that the proof was also allowable under the 49 Geo. 3, c. 121, s. 8—now the 6 Geo. 4, c. 16, s. 62.

The solvent partners paying the partnership debts may, if the separate creditors have been paid, be reimbursed the principal moneys due to them before the separate creditors receive interest out of the surplus of the bankrupt partner's estate,[1] and it is no impediment to this proof by the partners that the balance of the partnership accounts is not ascertained.[2] Moreover, if more than one partner become bankrupt under similar circumstances, the solvent partner may prove against the separate estate of each for the share of the debt which may be due by each to the partnership.

Generally, if, upon the bankruptcy of one of several partners, the joint creditors are all paid in full out of the joint estate, but the balance of accounts is in favor of the solvent partners, the latter may be reimbursed out of the bankrupt's share of the partnership estate, and may prove the deficiency against his separate estate, so as not to disturb dividends already made. Where, therefore, A, B, and C were

[1] Ex parte Rix, Mont. 237. In some cases the solvent partner may be appointed receiver of the partnership effects, and that on petition only. Ex parte Stoveld, 1 Glyn & Jam. 303. But see Ex parte Tupper, 1 Rose, 179.

[2] Ex parte Robinson, 4 D. & C. 499.

partners, and C became bankrupt, and under the commission against him 17*s.* in the pound were paid to the joint creditors, and there was sufficient joint estate to pay the remainder, it was ordered, upon the petition of A and B, that an account should be taken of the debts respectively due from the partnership of A, B, and C, to the petitioners respectively, and that the surplus, if any, of the funds of the joint estate, after paying 20*s.* in the pound to the joint creditors, or after retaining enough for that purpose, might be paid over to the petitioners, in or toward satisfaction of the debts that might be due and owing to them respectively, and that in case after such payment any balance should remain due and owing to the petitioners respectively from the bankrupt, the petitioners might be admitted to prove as creditors against his separate estate for the amount of their respective balances with the other separate creditors of the bankrupt.

What debts one partner may prove.

SEC. 944. When a partner retires from a firm and the remaining partner covenants to indemnify him against all outstanding demands, upon the bankruptcy of the remaining partner, the partner who has retired may, upon payment of all partnership debts for which he was liable, prove the amount so paid as a debt under the commission.[1] Nor will the right of proof be necessarily affected by the circumstance that the partner, at the time of his retirement, knew that the house was insolvent. Thus, in Ex parte Carpenter,[2] it appeared that in December, 1818, A, B, C, and D dissolved partnership as bankers, by deed, by which it was agreed that A and B should retire, and the business be carried on in future by C and D. C and D covenanted to indemnify A and B against all outstanding demands. In October, 1825, C died, and a commission issued against D. A having been obliged to pay certain partnership debts which C and D had undertaken to indemnify him against, it was held that he might prove under the commission for the amount so paid, although he knew the firm to have been insolvent at the time of the dissolution in 1818.

It appears, however, that the decision in this case would have been otherwise, if it could have been proved that the object of the bankrupt was to let the retiring partner escape; that they looked to a

[1] Ex parte Terrell, Buck, 345; Goss v. Dufresnoy, Davies' B. L. 371.

[2] Parker v. Ramsbottom, 3 Barn. & Cres. 257; 5 Dowl. & Ryl. 138. And if he neglect to prove, and the bankrupt partner obtain his certificate, the certificate will be a bar to an action afterward brought by the solvent partner on the covenant of indemnity. Wood v. Dodgson, 2 Rose, 47; 6 Geo. 4, c. 16, s. 52.

[3] Mont. & M'A. 1.

bankruptcy, and were, therefore, indifferent as to what might happen to themselves; or that the whole scope of the deed was to allow the retiring partner to get clear of the transaction.

When one partner may prove against estate of one, when there is a deficiency to pay private debts.

SEC. 945. Where a solvent partner pays all the joint debts, and proves against the separate estates of his bankrupt copartners for the respective sums each is bound to contribute, it has been a question whether, if the estate of one of the bankrupts is insufficient to pay his share of the debts, the solvent partner can come against the other bankrupt's estate for his proportion of the deficiency, besides the original contributory proportion already proved against his estate. It was held by Sir John Leach, when Vice-Chancellor, that this could not be done; but that the solvent partner could only prove for such sum as at the time of the bankruptcy each partner was bound to pay or provide, on the principle, that proof is equivalent to payment, without regard to the amount of the dividend, and also, that proof cannot thus be mounted upon proof.[1] Lord Eldon, however, on two occasions, expressed an opinion at variance with this doctrine.[2] And in Ex parte Moore, his Lordship, in reference to the decisions of Sir John Leach on this subject, observed as follows: "His Honor has been pleased to say, that proof is payment. Now, with great deference, I doubt whether the expression, that proof is payment, can be correctly used. If, indeed, the money were paid at the moment the proof was made, it might be a question, but in the case of three partners, and one becoming a bankrupt, and another paying the whole debt, that partner's right of proving a moiety of the whole debt against the other partner would be quite clear, if it were clear that

[1] Ex parte Watson, Buck, 449; Ex parte Smith, id. 492.

[2] Ex parte Hunter, Buck, 552; Ex parte Moore, 2 Glyn & Jam. 172. In Peter v. Rich, Rep. in Chanc. 19, two out of three sureties were compelled to pay in moieties, the third being insolvent. But it is otherwise at law; see Cowell v. Edwards, 2 Bos. & Pull. 268; Brown v. Lee, 6 Barn. & Cres. 689. It is said, *arguendo* in Ex parte Watson, Buck, 454, that the case of Wright v. Hunter, 1 East, 20, is an authority for the proposition, that if one partner pay more than his share of the partnership debt, he may in an action recover the amount so paid against any one of the other members of the firm. But in that case the defendant, though partner with the plaintiff in the ship, was also in a distinct partnership with other persons as ship's purser. The action was brought to recover moneys which the plaintiff had been compelled to pay on the purser's account. Therefore, *quoad* this transaction, the plaintiff was deemed to be in the situation of any ordinary creditor of the defendant, and therefore competent to maintain an action against the defendant, either jointly with his copartners, or separately, the defendant not pleading in abatement. In this case the defendant did not plead in abatement. See Lord Kenyon's judgment. See, also, Deacon's Bankrupt Laws, p. 670, note 1.

proof against the bankrupt partner could produce nothing; for the same equity which exists among them, if they all remain solvent, must be the equity which prevails among them when they become bankrupt; and the difficulty of ascertaining, at the time the bankruptcy takes place, who is solvent and who is not solvent, can never interfere with the substantial rights of the parties. I am inclined, therefore, to agree with the case supposed by Mr. Montagu, that if A, B, and C are partners, and there is a deficiency of 30,000*l.*, and C is wholly insolvent, A, paying the whole of such deficiency, is entitled to prove 15,000*l.* against B, B having the benefit of proof for 5,000*l.* against C. I take it to be clear that if A have two partners, and he pay more than his share, and one of his partners is insolvent, that insolvency is a mischief in which the other partner must partake, as well as he who seeks to prove."

Upon the principle of the supposititious case referred to by Lord Eldon, the case of Ex parte Plowden[1] appears to have been decided. There A, B, and C, being partners, A and B borrowed 10,000*l.* for the firm on the mortgages of their separate estates. The firm became bankrupt, and C. was wholly insolvent. The joint creditors being all paid, and A's mortgaged estate having paid more than his share of the debt, it was held that his estate had a claim to contribution from B's, for the difference between what B's estate sold for, and half the debt of 10,000*l.*

Rule as to distinct firms.

SEC. 946. Where there are distinct firms carrying on distinct trades, but consisting partly of the same members, and one firm becomes bankrupt, the solvent firm may prove against the bankrupt firm, if the estate against which proof is admitted is not liable with that of the solvent firm to joint debts. Thus, it is laid down by Lord Eldon, that the firm of A, B, C & D may prove against the firm of A, B, C & E; for, A, B, C & D are not liable for any joint debts with A, B, C & E.

In the case in which this observation was made, A and S carried on business as saddlers in London, and A carried on a distinct trade as a manufacturer of saddlers' ironmongery in Staffordshire, and the former house was indebted to the latter for goods supplied. A commission of bankrupt having issued against S, as surviving partner, it was held that A's executor could not prove under the commission for

[1] 3 Mont. & A. 402; 2 Dea. 456.

the amount of the goods so supplied; for, in this case, the firm of A & S was liable, together with A, for the same joint debts.[1]

However, the qualification of the rule above stated, namely, that the estate against which the proof is admitted must not be liable with the solvent partners for joint debts, was not regarded in Ex parte Hesham.[2] There A and B were partners with C, the bankrupt, who carried on a distinct trade, in which he had purchased goods of his firm. A and B petitioned to prove against C's estate for the amount of the goods sold. Lord Eldon allowed the claim, observing that the case was no more than this — one sole trader had bought articles of himself and partners, and proof must be made for that, however it might be arranged in account afterward. It was quite different from the common case of a partner not carrying on a distinct trade borrowing money.

When there are no joint debts.

SEC. 947. When there are no joint debts, a case which can scarcely be contemplated, the solvent partner may prove against the bankrupt partner, in competition with the creditors of the latter. In Ex parte Dodgson,[3] A, the mother of B, lent him a sum of money, under an agreement that she should share the profits of a partnership into which he was about to enter with C and D. By this agreement she became partner with B to the extent of his share of the profits, but was in no respect partner in the firm of B, C & D, and, therefore, not liable to their joint creditors. B's share of the profits was considerable, but it did not appear that A and B traded with such profits, or that there were any joint creditors of A and B. Upon B's bankruptcy, A was permitted to prove against his estate, in respect of the money lent.

Of proof between estates.

SEC. 948. We have seen that, where some of the partners are solvent, they are not permitted to prove in competition with the joint creditors, nor even in competition with the separate creditors of the bankrupt partner, unless they shall have first paid all the partnership debts. So, where all the partners become bankrupt, the general rule is that the separate estate of one partner shall not claim against the joint estate of the partnership, in competition with the joint cred-

[1] Ex parte Adams, 1 Rose, 305; Ex parte Thompson, 3 D. & C. 612; 1 Mont. & A. 324.

[2] 1 Rose, 146. See Ex parte Cook, Mont. 228.

[3] Mont. & M'A. 445.

itors, nor the joint estate against the separate estate, in competition with separate creditors; and the creditor is not considered as satisfied until he has received interest on his debt.[1]

Exceptions to rule.

SEC. 949. There are, however, two exceptions to the foregoing rule. 1. Where money or effects have been fraudulently abstracted from one estate and applied for the benefit of the other; and 2d, where some of the members of a partnership form an entirely distinct firm, carrying on a distinct trade from that of the general partnership, and where the articles of one trade have been furnished by one firm to the other.[2]

1. Where money or effects have been fraudulently abstracted from one estate to benefit the other.

Lord Eldon observed in Ex parte Harris,[3] that since the case of Lodge and Fendall, decided by Lord Thurlow, the law had been clear that, to make out the right to prove by the one estate or the other, it must be established that the effects, joint or separate, have been acquired by the one or the other improperly and fraudulently, or with intent to increase the separate estate of one partner to the prejudice of the other. In another case the same learned judge observed that if one partner were to take 50,000*l.* out of the firm, and buy real estates with it, although it would be a very hard case that the joint fund should thus be abstracted from the joint creditors, yet, if it was so done by contract, and not by fraud, the estate so purchased would

[1] Ex parte Ogle, Mont. 351. That the claim by the separate against the joint estate is not allowed, see Ex parte Burrell, Ex parte Pine, etc.; Co. B. L. 503. And as to the claim by the joint against the separate estate, see Ex parte Grill, id. 506. Until Lord Thurlow's time the rule had been otherwise. In Ex parte Hunter, 1 Atk. 327, Lord Hardwicke was of opinion that, if one of two bankrupt partners had lent money to the partnership, his separate creditors had a right to a dividend upon this, in common with the joint creditor. And in Ex parte Blake, Co. B. L. 503, Lord Talbot held that where one of two partners had, without fraud, taken out of the partnership stock more than his proportion of the partnership moneys, his estate was to be considered debtor to that of the partnership for the excess. The law, therefore, at one time certainly was, that if the debt claimed by the partners against an individual partner, and *vice versa*, arose out of contract, the proof might be admitted. But in the case of Lodge v. Fendall, if not earlier, Lord Thurlow receded from that opinion, and thought that if the claim arose out of contract, the estates should be administered jointly and separately, as they were actually constituted at the time of the bankruptcy. On the other hand it has been decided and understood, from Fordyce's case down to the present time, that where the debt does not arise out of contract, but out of a fraudulent breach of the obligation existing between the partners, there the funds so subtracted shall be considered as detached from the general partnership balance, and as a distinct debt from one estate to the other. Per Lord Eldon, 2 Rose, 41.

[2] Deac B. L. 665.

[3] 2 Ves. & Bea. 213.

go to the separate creditors.[1] It becomes, then, material to consider what amounts to fraud, in the cases which we are about to investigate.

Lord Eldon, after observing that Lord Thurlow by a fraudulent taking intended to express what he thought necessary to distinguish that from a taking by contract or loan, lays it down as a general rule that, if in either the expressed or implied terms of an agreement for a partnership, there is a prohibition of the act, and it is done without the knowledge, consent, privity, or subsequent approbation of the other partner before the bankruptcy, and to the intent to apply partnership funds to private purposes, that is, *prima facie*, a fraud upon the partnership.[2]

Lord Eldon illustrates these principles by the following hypothetical case. "Suppose," he says, "the case of a partnership between two, and, by the articles, all the money is to be paid in to their joint names at a particular bank, and they are prohibited from drawing out more than 50*l.* a month, each, for individual purposes; that during the month of January they mutually observed those articles by paying in, and on the 1st of February, one, instead of 50*l.* draws out 550*l.*, and upon the next day a bankruptcy happens, if it is made out that this overdrawing was for private purposes, and without the knowledge, consent, privity, or subsequent approbation of the other, then, as it was for private purposes, and therefore must be for the increase of the individual's estate, and as it was against the covenanted rights, or rather the prohibitions affecting both, and without the knowledge, consent, privity, or subsequent approbation of the copartner, it is as much a fraud within Lord Thurlow's rule, as if, according to the expression I am informed I formerly used, he had stolen the properly."

However, to constitute fraud for the purposes of which we are now speaking, it is not necessary that there should be a transgression of some express article. From Lord Eldon's words it appears that the act may be committed in breach of an implied term of an agreement. "Whenever, in short, there has been that sort of fraud, as in Fordyce's case and subsequent cases, that one partner may be represented as having stolen property (not using that term offensively), the court has said it is against conscience that his separate creditors should resist the restoration of that which the separate debtor from whom they seek payment has so unrighteously, against the consent of

[1] Ex parte Emly, 1 Rose, 64.

[2] Ex parte Harris, 2 Ves. & B. 213.

his partners and in fraud of their contract, taken out of the joint fund."[1]

Fordyce's case[2] was as follows: Neale, James, Fordyce and Down carried on the business of bankers in copartnership. In the course of their business they discounted, from time to time, bills and notes to a very large amount, which thereby became the joint property of the copartners. After the settlement of the last partnership account, at Christmas, 1771, Fordyce took out of the house and shop sundry of the aforesaid notes and bills, belonging to the copartnership, and applied them to his own separate use. An account was made out thereof, and after making all allowances to Fordyce for bills of his own, for cash paid by him, and for his share of the capital stock, the balance of the bills and notes so taken away by him, and applied to his own use, was agreed and admitted to be the sum of 55,504*l.* In June, 1772, a separate commission issued against Fordyce, and shortly afterward a joint commission issued against the firm. The assignees, under the latter commission, petitioned to prove against the separate estate of Fordyce the said sum of 55,504*l.*, and such proof was allowed.[3]

Rule when one partner is appointed manager.

SEC. 950. But where one partner puts the other in absolute possession of the partnership funds, and leaves to him the sole management of the partnership concern, this is *prima facie* an implied consent to any measure which the latter may adopt regarding the joint property, and the joint creditors must abide by the consequences of such arrangement. Therefore, where Fendall was a dormant partner with Lodge, and Lodge took out money from the partnership to a considerable amount, without the knowledge of Fendall, who did not intermeddle with the partnership business, Lord Thurlow, after taking time to consider, thought he could not permit the assignees under a joint commission to prove against the separate estate of Lodge, without deciding upon a principle that must apply to all cases, and constantly occasion the taking an account between the partners and the partnership in every joint bankruptcy. He said that if the affi-

[1] 3 Ves. & Bea. 34.

[2] Ex parte Cust, Co. B. L. 506.

[3] The petitioners likewise sought to enter a claim for sundry debts which had been proved under the joint commission, upon divers bills and notes which Fordyce had negotiated in the name of the firm, and for which he had received money to his separate use. Claims were likewise set up in respect of other separate transactions of Fordyce. But so much of the prayer of the petition as related to these matters was dismissed, without prejudice to any of the parties seeking relief thereupon by bill in equity.

davits had gone the length of connecting the bankruptcy with the institution of the partnership trade, and that Lodge, with a view of swindling Fendall out of his property, had got him into the trade, and then taken the effects of the partnership into his own hands, with a view to his separate creditors, it might have been different. The petition on the part of the joint creditors, to prove against the separate estate, was, therefore, dismissed.[1]

So, if one partner permit his copartner to deal with the partnership funds in a manner contrary to the express provision of the articles, any appropriation of the funds by the latter partner to his separate use must be taken to have arisen from the acquiescence of the other. Upon their bankruptcy, therefore, no proof can be allowed between the estates in respect of such appropriation. In Ex parte Harris,[2] the terms of the partnership of A and B were settled by a deed declaring that all money belonging to the joint estate, received by either of the partners, should once a month at least be paid into a particular bank, and that each might draw out 50*l.* a month, but no more, for his individual use. A generally received and made payments on account of the partnership, and generally paid the cash received on the partnership account into his own banker's, who was not the banker of the partnership, on his own account. B sometimes received money on the partnership account, and generally paid what he so received into the account of A at his banker's, and occasionally both received money on the partnership account without paying it into a banker's. The partnership had no account with any other bank than that appointed by the deed. B kept the partnership books, and the banker's book was always open to his inspection. A generally communicated to him the partnership receipts and payments, that he might make the account. The sum of 1,082*l.* was the balance due from A at the time of the bankruptcy. Neither of the bankrupts was aware until the accounts were made up by an accountant that A had paid less than he received.[3] The certificate of the commissioners, which set forth these facts, concluded by stating that A took the sum of 1,082*l.* from the joint estate, without the privity, contract, or subsequent approbation of B, but not with the intention to increase A's separate estate. The question was whether the assignees under the joint commission should prove the 1,082*l.* against the separate estate of A. Lord Eldon,

[1] Ex parte Batson, Co. B. L. 505; and see Ex parte Assignees of Lodge & Fendall, 1 Ves. Jr. 166.

[2] 2 Ves. & Bea. 210; 1 Rose, 129.

[3] This, though a striking feature in the case, does not appear to have influenced the decision.

"This is much nearer the case of Lodge and Fendall than any that have occurred, the necessary effect of the transaction being to give the dominion over the whole fund to one, and the other must be taken to have consented to that dominion. Therefore, though the non-application of this joint property, according to the articles, was without the knowledge, privity, consent and subsequent approbation of the partner, yet the facts, by reason and in consequence of which that application was made, were with that knowledge, consent, etc. In this view of the case upon the facts stated, there is great difficulty in admitting the proof. If any inquiry can be suggested, that can effect the opinion I have expressed, I will not refuse it, but, upon these facts, I think this within the case of Lodge and Fendall."

Where, in pursuance of the partnership articles, one partner is intrusted or empowered to draw bills and manage the cash concerns of the copartnership, the acquiescence of the firm in his drawing out of the partnership funds for his separate use may be established or contradicted by reference to the state of the partnership books. Therefore, where S, in pursuance of articles of partnership, took the active part and management of the concern, and drew the drafts, and kept the cash accounts, and S, without the knowledge of his copartners, drew bills and notes in the partnership name for his separate use to a large amount, and made no entry in the books of any such bills or notes, which, in the ordinary way, ought to have been, Lord Eldon held that the arrangement made by the articles was not an acquiescence in the conduct of S, and that S took this property under circumstances in which, if all the partners were bankrupts, proof by the partnership against his separate estate would have been permitted.[1]

On the other hand, if one partner be intrusted with the entire management of the partnership concern, and he withdraw moneys for his separate use, which he duly and openly enters in the partnership books, this is not a fraud which will entitle the joint estate to prove against the separate; otherwise, if by the entries in the books he disguises the transaction or wholly omits and conceals it.[2]

Where a partner has abstracted the partnership property in order to increase his separate estate, the subsequent approbation of the other partners is not to be inferred on slight grounds, and the receipt of interest by the other partners for the sum so abstracted is no evi-

[1] Ex parte Younge, 8 Ves. & Bea. 81.

[2] Per Sir J. Leach, Ex parte Smith, 1 Glyn & Jam. 74.

dence *per se* of subsequent approbation. In Ex parte Watkins,[1] A, B and C were in partnership as bankers. According to the established practice of the firm, and in order that sales might be readily made when required, it was customary to transfer into the name of one of the partners all stock purchased by the house as an investment for capital. Under this arrangement B, having 20,000*l.* of stock standing in his name, sold it out and applied about half to his separate use, without the knowledge of his partners. A day or two afterward B told C that he was in want of money, and had, therefore, taken 10,000*l.* Consols, partnership stock, to his own use; C replied that he was sorry for it, and that B must replace it as soon as he could. C, afterward, finding that B had not replaced the stock, charged him with the dividends, because he considered it necessary to get what he could. C never considered the transaction as a loan. A joint commission having issued against the partners, Sir L. Shadwell ordered that proof should be made by the joint estate against the separate estate of B for the value of the 10,000*l.* stock, his Honor being of opinion that, under the circumstances, there was nothing like asquiescence amounting to subsequent approbation.

But, in Ex parte Turner,[2] where A and B, partners, were authorized by their articles to draw sums from time to time, not exceeding 700*l.* a year from the joint funds, by way of maintenance, and A discovered that B had withdrawn bills to the amount of 2,700*l.* from the joint-stock, which he had not entered in the books, but had applied to his own use; and A, upon this discovery, remonstrated with B, who promised to replace the amount, and the bills were accordingly entered in the books, and, subsequent to this transaction, A relieved B's wife and family; it was held by the Court of Review that the fraud of B was waived by the subsequent conduct of A.

Where some of the members of a partnership form a distinct firm, carrying on a distinct trade from that of the general partnership, and the articles of one trade are furnished by one firm to the other.

SEC. 951. In the case of Shakeshaft, Stirrup and Salisbury,[3] Lord Thurlow went upon this distinction, that where there is only one partnership, arranging different concerns belonging to them all, in different ways, for the benefit of different parts of that join concern, there could not be proof by part against the other part; otherwise, if the trades were perfectly distinct.[4] Therefore, although on the one

[1] Mont. &. M'A. 157.
[2] 1 Mont. & A. 54, 357; 4 D. & C. 169.
[3] 6 Ves. 123, 743, 747 1 Cox. 440.
[4] Per Lord Eldon, 11 Ves. 414.

hand, where three partners carried on the business of cotton manufacturers in Lancashire, and two of them had a branch establishment in London, it was held that there could not be proof by the estate of the three against that of the two;[1] yet, on the other hand, where A and B were partners as insurance brokers, and A carried on a separate trade as an oilman, in the progress of which he became indebted to the firm, the assignees of the joint estate were admitted creditors of the separate estate.[2]

The trades carried on by the two firms, between the estates of which proof is admitted, must be distinct; but it does not seem to be necessary that their callings should be different, though the contrary might be inferred from the observation of Lord Thurlow, as stated by Lord Eldon in Ex parte St. Barbe. Thus, A and B carried on the trade of wool-stablers in copartnership at Southwark, under the firm of A & B, and they also carried on trade as wool-staplers, at Leeds, under the firm of C & Co., but C was a servant to A and B, receiving from them a salary. The concerns were kept totally distinct from each other, and in all matters of trade and mutual dealings between the two houses, regular accounts were opened, and regular debits and credits were entered in their respective ledgers, and the same conduct was in all respects observed as would have been the case had the proprietors of such respective concerns been different and distinct persons. The firm of C & Co. being indebted to that of A & B, the estate of A & B was permitted to prove the amount against the estate of C & Co.[3]

So, in a more modern case, A, B, C, D and E carried on business as bankers, at York, in copartnership; A, B, C and D carried on a distinct trade, in copartnership, as bankers, at Wakefield. Debts being due from the latter firm to the former, in respect of their banking transactions, and a commission of bankrupt having issued against the firm at York, proof was allowed by the estate of the York firm against that of the Wakefield firm.[4]

But, although in order to establish this mode of proof it is not necessary that the nature of the trades exercised by the two firms should be different, provided it can be shown that the two firms were really conducted on a separate account, yet, it was the opinion of Lord Eldon that in no case ought such proof to be admitted, except the demand of the party seeking to prove arise from a dealing in

[1] Ex parte Hargreaves, 1 Cox, 440.
[2] Ex parte St. Barbe, 11 Ves. 413.
[3] Ex parte Johns, Co. B. L. 510.
[4] Ex parte Castell, 2 Glyn & Jam. 124; Ex parte Stroud, id. 127.

respect of his distinct trade; as, for instance, for articles furnished by that trade. This doctrine was laid down and acted upon in the case of Ex parte Sillitoe.[1] There, six persons carried on business as bankers, and two of the six also carried on a separate business as ironmongers. The Bank of England were in the habit of discounting bills for the ironmongers, but not for the bankers; and when the bankers were in want of money, the ironmongers raised it for them at the bank, by discount of the ironmongers' bills. All these six persons became bankrupts, and, at the time of the bankruptcy, the bankers were indebted to the ironmongers, in respect of such discounts, in the sum of 8,222*l.* It was insisted, on behalf of the assignees of the ironmongers, that their estate, which was first applicable to the payment of debts incurred in that trade, had been diminished to the extent of this sum of 8,222*l.* by the assistance thus rendered to the bankers; that, therefore, the ironmongery estate ought to be considered as a creditor of the banking estate, and to receive dividends out of that estate on the sum of 8,222*l.* *pari passu* with the other banking creditors of the bankers. The question first came before Sir John Leach, who was of opinion that the separate creditors were entitled to the proof they claimed, but his decision was overruled by Lord Eldon.

Lord Eldon proceeded on these principles—that the general rule in bankruptcy is, that a partner in a firm against which a commission of bankrupt issues shall not prove a personal debt against that firm, in competition with the creditors of the firm, who are, in fact, his own creditors, and that this general rule admits of no exception, unless where the partner to whom the firm was indebted carried on a distinct trade, and the debt from the firm was in respect of that distinct trade; that the case of two or more partners carrying on a distinct trade is the same as that of one partner carrying on a distinct trade; and that, although in this case the separate estate of the ironmongers might have proved against the joint estate, if the debt had accrued by a dealing in their trade as ironmongers, yet they could not prove, inasmuch as the separate debt had accrued, not by a dealing as ironmongers, but by loans of money. "We are not," said his Lordship, "merely to consider the question, whether the two were partners as ironmongers, but whether this is to be considered a transaction between trade and trade; and if it be supposed that any individual of the six had been a separate trader, coal dealer, or corn dealer, and

[1] 1 Glyn and Jam. 374.

had, with his separate moneys, retired a bill discounted at the Bank of England, is it to be said, that because he is a separate trader, that therefore the retiring of that bill is to make him a creditor to prove against the creditors of the partnership? And if that would not entitle the individual to prove, is there any distinction between the case of one separate trader and the case of two individuals who are separate traders in partnership?" His Lordship, on a subsequent day, stated that he had looked at the authorities on the point, and he found they were all cases in which articles of one trade had been furnished to another trade; that there was no case in which the exception had been allowed where money had been advanced to the partnership by one or more of the partners, and that his opinion was the proof could not be maintained.

The principles laid down by Lord Eldon, in Ex parte Sillitoe, were acted upon by Lord Brougham, in the case of Ex parte Cook.[1] There, W P was in partnership with H and others as linendrapers at Whitechapel, and he was likewise a partner with his brother, E P, in the trade of linendraper in the country. The country firm was carried on in the name of E P alone. The London firm supplied linendrapery goods to the country firm, such dealings being wholly distinct, and the same as if the London firm had dealt with any other purchaser. The London firm was afterward dissolved, and W P carried on the business at Whitechapel on his own separate account. He continued to supply the country firm with goods, precisely in the same manner as the London firm had done, such dealings being wholly distinct, and the same as if the dealings had been with any other purchaser or customer. A separate commission of bankrupt issued against W P. Afterward, a joint one issued against the brothers. The question was, whether the sum of 635*l.* due from the estate of the country firm to that of W P, for goods supplied and money advanced, should be proved against the former estate. Lord Brougham ordered the whole debt to be proved, and dividends to be paid upon the goods sold, *pari passu* with the other creditors, and for the money advanced, a dividend to be paid out of the surplus, after payment of the general creditors.

Upon the whole, therefore, the general principle to be gathered from these decisions is, that where one or more members of a firm carry on a distinct trade, proof will be admitted between the estate of the general and the particular firm, *pari passu* with the creditors, in all cases

[1] Mont. 228.

where the debt has arisen from goods furnished by one firm to the other, in a manner as if they had been utterly unconnected in trade, but that, except in the case of bankers, this rule will not be applicable where the debt has arisen only from money advanced by one firm to the other.

But though such is apparently the settled law on the subject, we ought not to omit to notice the doubts entertained by Sir John Leach, on the doctrine as laid down by Lord Eldon in Ex parte Sillitoe, that there is no difference between the case of two or more partners carrying on a distinct trade, and the case of one partner carrying on a distinct trade. "As a general rule," said his Honor, "one partner cannot prove a personal debt against the joint firm, because the creditors of the joint firm are his creditors, and he would be taking from his own creditors what ought first to be applied in payment of their debts. But where a firm of two or more partners carry on a distinct trade, the creditors of the larger firm are not the creditors of the smaller firm, and, consequently, when the firm of two or more prove against the larger firm, they do not prove against their own creditors. Upon this reasoning I cannot but still doubt whether the smaller firm of two or more is not in all cases entitled to prove against the larger firm, and whether it can make a difference that the debt due to the smaller firm is in respect of a dealing in the way of their distinct trade, or in respect of any other dealing with the larger firm."[1]

If the opinion of Sir John Leach had been adopted, it should seem that in cases of distinct firms, and all becoming bankrupt, proof would have been admissible between each estate in respect of every species of money transaction, except in one particular case, namely, where one partner, a distinct trader, sought proof against the general partnership. But it is to be remarked that the exception to the general rule of proof which has been allowed with regard to debts arising from distinct trading, is founded on a universal principle, which, if adopted in one case, ought also to be adopted in another. This principle is the same as that which suggested the doctrine of reputed owership.[2]

On the occasion on which Sir John Leach made these observations, his Honor decided in favor of the proof in three different cases; but

[1] 2 G. & J. 127. It should seem that the Court of Review adheres to the opinion of Sir John Leach. See Ex parte Dawson, 3 Dea. & C. 12; but that is not an express decision on the point.

[2] The same principle would have warranted the double proof in Ex parte Moult, *ante*, had not a positive rule in bankruptcy intervened.

it was unnecessary to depart from any principle laid down in Ex parte Sillitoe.

In the first of these cases, Ex parte Brenchley,[1] the banking firm, consisting of three, claimed to prove against the distilling firm consisting of two, for advances of money made by the bankers to the distillers; one of the two distillers was not a partner in the banking firm, but Sir John Leach said, that if he had been, the advance of money by the bankers was a sufficient dealing in the way of their trade.

Secondly, in Ex parte Stroud,[2] the debt due by the minor firm to the larger firm was in respect of the employment of the surplus moneys which the larger firm had in their hands as bankers; Sir John Leach observed, that the profit of a banker was made by the employment of such surplus moneys, and the debt was to be considered as due to them in respect of a deal ing in their trade.

Lastly, the case of Ex parte Castell[3] was referred to the same principle. His Honor considered that the dealing of the one firm with the other was in the way of their trade, and proof was, therefore, to be made by the York firm against the Wakefield firm.

In some cases contribution will be permitted between the joint and separate estate. As where joint creditors have been permitted under an order to go against the separate estate, or joint creditors of a dormant and visible partner have proved against the visible partner alone. So in a case where both the joint and separate estates were liable to a debt to the Crown, and, by process, more had been levied upon the joint estate than its proportion, contribution was decreed between the two estates, and it was referred to the Master to settle the proportion.[4]

Of set-off.

SEC. 952. Formerly if a creditor of the bankrupt were also indebted to the bankrupt, the assignees might sue him for and recover the amount of the latter debt, and the creditor might prove upon the bankrupt's estate for the amount of the debt to him. This was extremely disadvantageous to creditors where there happened to be mutual dealings between them and the bankrupt. They would have to pay the whole of the debts due by them and receive probably but a fractional part of the debts due to them. This was remedied by the 5 Geo. 2, c. 30, s. 28, and 46 Geo. 3, c. 135, s. 3, which made the

[1] 2 Glyn & Jam. 127.
[2] Id.
[3] Id.
[4] Rogers v. Mackenzie, 4 Ves. 752.

balance of the accounts between the parties, the debt in law to be proved by the creditor or recovered by the assignees.[1]

Although those statutes are now repealed, their provisions are contained in the stat. 6 Geo. 4, c. 16, s. 50, by which it is enacted, that "where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the Commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him, and what shall appear due on either side on the balance of such account, and no more, shall be claimed and paid on either side respectively, and every debt or demand hereby made provable against the estate of the bankrupt, may also be set off in manner aforesaid against such estate; provided the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy[2] by such bankrupt committed."

The term *mutual credits* imports something more than that of "*mutual debts.*" Nevertheless, it has been held to mean such credits only as must in their nature terminate in debts; as where a debt is due from one party, and credit given by him on the other side for a sum of money payable at a future day, and which will then become a debt, or where there is a debt on one side and a receipt of property with directions to turn it into money on the other; but where there is a mere deposit of property, without any authority to turn it into money, unless the deposit be made with one who has a general lien, no debt can ever arise out of it, and, therefore, it is not a credit within the meaning of the statute.[3]

---

[1] Archb. B. L. Book 1, ch. 1, s. 7.

[2] Notice of the bankrupt's insolvency does not prevent the creditor's right of set-off. Hawkins v. Whitten, 10 Barn. & Cres. 217.

[3] Rose v. Hart, 2 Moore, 547; Rose v. Sims, 1 Barn. & Ad. 521; Groom v. West, 8 Ad. & Ell. 758. Where there is a trust between the parties, that is a mutual credit within the statutes. Therefore, where three persons joined in an adventure to buy and to sell pearls, one to advance the money and to sell the pearls, and the profit and loss to be divided between the three, upon the bankruptcy of one, the holder of the pearls was allowed to set off a debt due by him to the bankrupt against the bankrupt's share of the pearls, although the pearls were not sold nor the produce received before the bankruptcy. French v. Fenn, Co. B. L. 536. But mutual credit may be constituted, although the parties do not mean particularly to trust each other; thus, where a bill of exchange, accepted by A, got into the hands of B, and B bought goods of A, it was holden that there was a mutual credit between A and B, although A did not know that the bill was in B's hands. Hankey v. Smith, 3 T. R. 507, *n.* In these cases, what was allowed as a mutual credit was of such a nature as must terminate in a cross debt. In cases of the deposit of goods, where the creditor, as for instance a factor, broker, banker, etc., has a general lien, he may, independently of any statute as to set off or

Mutual debts, of course, consist of a debt due from the bankrupt to the creditor, and a debt due by the creditor to the bankrupt's estate.[1] The debt due to the bankrupt must be such as might be proved under the commission, but those debts may be set off which are made provable by the Bankrupt Act.[2] With respect to the debt due by the creditor to the bankrupt's estate, formerly it must have been due before the act of bankruptcy on which the commission was founded. But, by the present statute, the accounts of mutual debts and credits, as far as regards paper and money transactions, may be brought down to the date of the fiat, and set-off will be allowed under such accounts, unless the creditor, at the time of his dealing with the bankrupt, had notice of an act of bankruptcy. The statute enacts "that all payments really and *bona fide* made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, and all payments really and *bona fide* made, or which shall be made to any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed."[3]

To constitute that mutuality of debts or of credits which is required by the statute, it is necessary that the debt claimed or the credit given, should be so due to or given by the party in his own right.[4]

---

mutual credit, retain the goods in his possession until he has been satisfied his whole debt. But such general lien, either by express contract or usage of trade, must be well established. Ex parte Ockendon, 1 Atk. 234; Rose v. Hart, *supra*. Where a bailee is intrusted with property of a bankrupt for a special and limited purpose, such a transaction does not form a case of mutual credit within the statute. Key v. Flint, 1 Moore, 451; 8 Taunt. 21; Buchanan v. Findlay, 9 Barn. & Cres. 738; 4 Man. & Ryl. 593.

[1] Archb. B. L. Book 1, ch. 1, s. 7.

[2] 6 Geo. 4, c. 16, s. 50, *supra*.

[3] 6 Geo. 4, c. 16, s. 82, overruling Tamplin v. Diggins, 1 Camp. 312, and Kinder v. Butterworth, 6 Barn. & Cres. 42; 9 Dowl. & Ryl. 47. In the former of these cases, bankers having accepted bills for the accommodation of a trader, and he, after an act of bankruptcy but before the commission, having lodged money with them to take up the bill, it was holden that they were bound to refund this money to the assignees, and could not set it off.

[4] Lanesborough v. Jones, 1 P. W. 325; Bishop v. Church, 3 Atk. 691; Ex parte Whitehead, 1 Glyn & Jam. 69.

Generally, therefore, in bankruptcy, as well as at law, there can be no set-off between joint and separate debts, unless otherwise provided for by special agreement.[1] And where a debt has been converted from a joint into a separate debt, it cannot be set off against a joint debt. Thus, A and B, partners, were creditors of C, who had also a joint demand against them. A and B having dissolved partnership, A, by a letter addressed to C, made himself separately liable to C on account of the joint demand against himself and B; Lord Eldon held that A was not entitled to set off against C's demand, though originally joint, the joint debt due from C to A and B.[2]

Equitable set-off.

SEC. 953. But the rule in bankruptcy against the set-off of joint and separate debts is not so strict as to preclude the admission of equitable set-off in a few particular cases, equitable set-off having prevailed long before the statute.[3] "It is true," observed Lord Eldon, "that where the court does not find a natural equity going beyond the statute, the construction of the law is the same in equity as at law; but that does not affect the general doctrine upon natural equity."[4]

A strong case of this kind occurred before Lord Loughborough.[5] There A and B were partners, and indebted by joint and several bond to C. Upon A's retirement from, and D's accession to the firm, advances were made to C to the exact amount of his debt, out of the moneys deposited by D for the purchase of A's share of the partnership. The bond was not given up, but A took a separate note from C for the amount. B died. Upon the bankruptcy of C, A was allowed to set off the money secured by the note against the money secured by the bond. The grounds of Lord Loughborough's decision appear to have been, not that A was liable for the bond debt as surviving partner, and, therefore, that he might set against it his separate debt on the note, but that the joint transaction had not terminated by the mere fact of A's taking a separate note; that A had not been accepted as separate debtor; that the bond had not been given up, and that the debt had been paid out of the assets of the old partnership; that, therefore, the joint debt secured by the bond might be

[1] Ex parte Riley, W. Kelynge, 24; Ex parte Christie, 10 Ves. 105; Ex parte Twogood, 11 id. 517; Kinnersley v. Hossack, 2 Taunt. 170; Ex parte Soames, 3 Dea. & C. 320.

[2] Ex parte Ross, Buck, 125.

[3] 2 Geo. 2, c. 22; 8 Geo. 2, c. 24; Ex parte Blagden, 19 Ves. 467; Whyte v. O'Brien, 1 Sim. & Stu. 551.

[4] 11 Ves. 27.

[5] James v. Kynnier, 5 Ves. 108

set off against a debt which was equitably joint, though represented by a separate security.

Where stock, the separate property of A, is transferred to bankers, as a security for advances made by them to A, who likewise gives them his note for the amount, payable on a re-transfer of the stock, and A afterward pays off the note, and substitutes the joint note of himself and son, without calling for a transfer, then, if you can show a clear and distinct series of transactions, in which both the father and son have had credit given to them, as credit was previously given to the father only, you certainly have very strong evidence of such a case as would authorize a court of equity in allowing a set-off as between the stock-debt due to the father, and the advances made to the father and son.[1]

Another exception to the general rule occurred before Lord Erskine,[2] but the case involved a principle totally different from that of the foregoing. There A and B were indebted, as principal and surety, in a joint bond, and A was a creditor of the obligees to an amount exceeding the bond. The obligees, who were bankers, having become bankrupt, and their assignees having brought an action against A, the latter presented a petition praying that he might be allowed to set off and to prove the balance, and Lord Erskine allowed the claim. "In this case," said his Lordship, "I am not obliged to do more than courts of equity were in the habit of doing before the statute of set-off existed, which statute was made only to prevent circuity. Suppose the bankruptcy had not occurred. A plea of set-off could not have been put into an action by the bankers, but, the moment they obtained judgment, the petitioner would have brought an action, and, if the surety had paid the joint debt, would have repaid him by the money recovered in that action; if the petitioner himself had paid it, he would then have been reimbursed, and, if they had paid in moieties, they would have divided it. So, the thing would have been just as if no action had been brought. Without the aid, therefore, of the extraordinary principles of fraud which governed the case of Ex parte Stephens,[3] there is a clear principle that decides this case, that assignees in bankruptcy take subject to all equities attaching upon the bankrupt, and, as the condition of the bankrupts, if they had continued solvent, would, as between them and these persons, be such as I have represented, that must be the condition of the assignees."

[1] Vulliamy v. Noble, 3 Mer. 618.
[2] Ex parte Hanson, 12 Ves. 346; 18 d. 233.
[3] See *infra*.

In cases where the bankrupt has committed a gross fraud against his creditor, the latter will be allowed a set-off of joint and separate debts. Thus, where A had instructed her banker to purchase certain stock in her name, which they, contrary to the fact, represented to have done, by making false entries in her book, and giving her credit for the dividends, and B, the brother of A, borrowed a sum of money of the bankers on the joint and several promissory note of himself and sister, Lord Eldon held that A might set off the sum so borrowed against the debt due from the bankrupts, and might prove for the residue.[1]

Again, V, a customer of the banking-house of D. & Co., transferred to P, a partner in that house, a sum of stock, by way of security for money borrowed of them, and gave his notes for the amount, payable on the stock being transferred to him. V paid off these notes, and afterward borrowed a further sum on the joint note of himself and his son, without calling for a retransfer. P fraudulently sold the stock, together with other stock, and applied the produce to the use of the partnership. It was held, on the authority of Ex parte Stephens, that V might set off, against the joint note of himself and son, so much of the money received by the partnership out of the sale of the stock as was equal to the amount of such joint note.[2]

On a subsequent occasion,[3] Lord Eldon, speaking of Ex parte Stephens, observed that the decision entirely depended on the fraud, and it is clear that he was anxious not to extend this class of cases.

Thus, in Ex parte Twogood,[4] it appeared that A and B, of the firm of S & Co., did, for certain considerations, jointly and severally covenant to pay C the sum of 4,000*l.*, with interest. In April, 1803, S & Co. stopped payment, and a separate commission issued against B. At the time of the bankruptcy, C was indebted to the house in a sum much greater than the debt due to him from A and B; he, however, proved his debt and interest, amounting to 4,200*l.*, under the commission against B, and, in July, 1803, assigned it to a stranger for 5,500*l.* A petition was then presented on the part of the creditors of the house, praying a set-off of the two debts, and suggesting that the assignment of C's debt was made without consideration, and with a view to obtain payment of the dividend from the separate estate of B, while C's debt was due to the joint estate; and likewise suggesting that there would be a surplus of B's separate estate, in which

[1] Ex parte Stephens, 11 Ves. 24.
[2] Vulliamy v. Noble, 3 Mer. 50.
[3] Ex parte Blagden, 19 Ves. 46.
[4] 11 Ves. 517, overruling Ex parte Quinten, 3 id. 248, and Ex parte Edwards, 1 Atk. 100.

the creditors of the house were interested. But Lord Eldon dismissed the petition, saying that he did not deny that there was a good deal of natural equity in the proposition upon which it stood; but, pursuing it through all its consequences, it would so disturb all the habitual arrangement in bankruptcy that he dared not permit the set-off.

It appears, therefore, that, even on equitable grounds, except under special circumstances, there cannot be a set-off as between the joint and separate debts. Thus, in Addis v. Knight,[1] a debtor by bond to a separate estate of a deceased partner was not allowed in equity to set off his bond debt in respect of acceptances for which he had become liable to the partnership estate, and which were proved by him under a joint commission of bankrupt.

It will be observed that, under the 50th section of the statute, set-off is allowed between the creditor and his bankrupt debtor, only under the proviso "that the person claiming the benefit of such set off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed." Therefore, in an action brought by the assignees of certain bankers, it was held that, under this section, the defendant had no right to set off notes of such bankers, taken by him after he knew that three of the four partners constituting the banking-house had committed acts of bankruptcy.[2]

[1] 2 Mer. 117.

[2] Dickson v. Cass, 1 Barn. & Adol. 343. See Craven v. Edmonson, 6 Bing. 734.

APPENDIX OF FORMS.

PRECEDENTS.[1]

No. I.

Deed of Partnership between two Traders. (*General Form.*)

This indenture, made the day of , 1832, between A, of, etc., of the one part, and B, of, etc., of the other part; Whereas, the said A hath for many years carried on the trade or business of , at , and the said A and B are desirous to become partners in said trade, for the term and under the stipulations hereinafter mentioned: Now this indenture witnesseth, that each of them, the said A and B, for himself, his heirs, executors, and administrators, doth hereby covenant with the other of them, his executors and administrators, in manner following that is to say

1. That they the said A and B shall be partners in the trade or business of

2. That the said partnership shall commence on the day of next, and shall continue for the term of fourteen years thence next ensuing, if the said A and B shall so long live. Provided, that if either of the said partners shall be desirous to determine and dissolve the said partnership at any time before the expiration of the said term of fourteen years, and shall give six calendar months' notice in writing of such his desire to the other of the said partners, then, and in such case, the said partnership shall cease and determine upon the expiration of the said six calendar months, or at such future day or time as shall be named in the said notice.

[1] For two valuable precedents in the following collection, the author is indebted to W. C. Macdougall and J. P. Wilmot, Esquires, of Lincoln's Inn.

3. That the firm and style of the said partnership or house of trade shall be ; and that the said trade or business shall be carried on under the said firm in the messuage belonging to the said A, in aforesaid, or in such other place of business as the said partners shall from time to time mutually agree upon.

4. That the capital of the said partnership shall consist of the sum of £ , which shall be brought in by the said partners in the following proportions, namely, the sum of £ , being two-thirds thereof, by the said A, and the sum of £ , being the remaining one-third, by the said B; and the said sums so to be advanced by the said partners respectively shall be paid by them into the bank of Messrs. , at aforesaid, to the credit of the said partnership, on or before the day of now next ensuing: "Provided that out of the said sum of £ (the whole capital), the sum of £ shall, within one calendar month after the commencement of the said partnership, be paid to the said A as and for the price or purchase-money of the stock in trade now in his possession (and also the implements heretofore used by him in his trade or business of a , carried on in the said messuage in aforesaid), and which stock in trade it is hereby agreed shall be purchased by the said partnership at the price aforesaid; and the said partners shall be entitled to and interested in the capital stock and effects of the partnership in the following proportions, that is to say, A in two-third parts thereof, and B in the remaining one-third part.

5. That the said partners shall be entitled to the profits of the aid business, in the proportions following, namely, the said A to two-third parts, and the said B to the remaining one-third part thereof. And that all losses happening in the course of the said business shall be borne by them in the same proportions (unless the same shall be occasioned by the willful neglect or default of either of the said partners, in which case the same shall be made good by the partner through whose neglect the same shall arise).

6. That the said A shall be at liberty, from time to time, to draw out of the said business any sum or sums not exceeding the sum of £ per month for his own use. And the said B shall also be at liberty to draw out of the said business any sum or sums not exceeding the sum of £ per month for his own use, such sums to be duly accounted for by them respectively on every settlement of accounts and division of the profits of the said business.

7. That the said A shall be allowed by the said partnership the clear yearly sum of £ , by way of rent for the said messuage in aforesaid, so long as the said business shall be carried on therein, but that the said messuage shall continue the sole property of the said A, subject only to be used for the purposes of the said partnership business.

8. That, as well the said rent as all taxes and other outgoings which shall become payable in respect of the messuage wherein the said business shall be carried on; the costs of insuring the stock in trade and fixtures belonging to the said partnership from loss or damage by fire, and of keeping the said messuage and premises of A, so long as they shall be used in the said partnership business, in good and substantial repair; the expense of providing coals, and candles, and of paying clerks, porters and servants, to be employed in the said business, and of traveling, and all other disbursements and expenses which may be incurred by the said partners respectively in the course of the said business, shall be paid and borne out of the profits of the said business.

9. That proper books of accounts shall be kept by the said partners, and that true, plain, and perfect entries shall be made by each of them therein, of all the moneys, goods, wares, merchandises, effects, debts, and things relating to the trade or business of the said partnership, or which shall be received, paid, sold, or contracted for, in the course of such trade or business, and of all such other matters and transactions as are usually entered in books of accounts by , or as may be necessary or useful for the better manifestation of the state and proceedings of the trade or business of the said partnership; and that the said books of account, together with all bonds, bills, specialties, assurances, notes, letters, and other writings, which shall from time to time concern the said partnership, shall be kept at the shop of the said partnership, in the house of A, at aforesaid, or in such other place where such trade or business of the said partnership shall from time to time be carried on: And that each of the said parties shall and may have free and equal access to the same without the interruption of the other.

10. That each of them, the said A and B, shall and will, at all times during the continuance of the said partnership, diligently and faithfully employ themselves in and about the affairs of the said partnership, and carry on the said business for the greatest benefit and advantage of the said partnership. And that each of the said partners

shall be just and faithful to the other in all dealings and transactions in and about the premises; and shall and will, on request, give, make and render to the other a just and faithful account of the same, when and so often as the same shall be reasonably required. And that each of them shall at all times, upon the reasonable request of the other of them, deliver up or communicate to the other of them all such letters, accounts, writings, and other things, as shall or may come into his hands or knowledge, in anywise touching the trade or business of the said partnership.

11. That no apprentice, clerk, or servant, shall be taken or engaged, or employed in the said business by either of the said partners, without the consent of the other of them, and that all premiums and apprentice fees to be paid with any apprentice shall be considered as part of the profits of the said business, and be divided accordingly.

12. That neither of them, the said A and B, shall, without the consent in writing of the other of them, employ any of the moneys, goods, or effects belonging to the said partnership, or engage the credit thereof, in any matter or thing, except on the account or for the use and benefit of the said partnership.

13. That neither of them, the said A and B, shall or will, either by himself or any other person or persons whomsoever, during the continuance of the said partnership, directly or indirectly engage in any trade, manufacture, or business, except upon the account and for the benefit and advantage of the partnership.

14. That neither of them, the said A and B, shall buy or engage in any contract for any goods, or any other article whatsoever, exceeding the value of without the consent in writing of the other first had and obtained.

15. That neither of them, the said A and B, shall transact any business, or enter into any contract or agreement with, or give credit to, any person or persons; or lend or advance any sum or sums of money out of the said partnership funds to any person or persons, after he shall be requested by the other not to do the same: And that neither of them, without the consent of the other of them, shall compound, release, or discharge, any debt or duty which shall be due or owing to the said partnership, without receiving the full amount thereof; nor sign any bankrupt's certificate, letter of license, or other instrument, whereby any debt or security shall be in anywise discharged, vacated, or diminished: And also, that neither of them, the said A and B, without the consent of the other of them, shall

draw or accept any bill of exchange or promissory note, or contract any debt on account of the said partnership, except in the usual and regular course of the business of the partnership, and for the benefit thereof: And that neither of them shall become bail or surety for any person or persons: And that neither of them, the said A and B, shall assign over his share or interest in the said partnership, or withdraw his share of the capital therein, or carry on, either separately or in partnership with any other person or persons, the business of , or knowingly or willingly do, commit, or permit, any act, matter, or thing whatsoever, by which, or by means of which, the said partnership moneys or effects shall be seized, attached, extended, or taken in execution.

16. That on the day of now next ensuing, and every succeeding day of , in every year during the continuance of the said partnership, a general account and rest, in writing, shall be made and taken by the said partners, of all such goods, wares, and merchandises, as shall have been sold in the said trade or business, and of all stock, moneys, debts, and other things belonging, due, or owing to the said partnership; and of all such debts as shall be due or owing from or by the said partnership to any person or persons, by reason of the said trade or business; and of all such other matters and things as are usually comprehended in annual accounts of the same nature taken by ; and a just value and appraisement shall be made by the said parties of all the particulars included in such account, which may be appraised. And the said general account or rest, valuation or appraisement, shall from time to time be written in two books, and be signed and subscribed in each of such books by each of the said partners, within one month after the time appointed for the taking thereof respectively, and after such signing and subscribing, each of the said partners shall take one of the said books into his custody, and shall be bound and concluded by every such account respectively, unless some manifest error shall be found therein, and signified by either of the said partners to the other of them within one year from the date of such account: in which case, but not otherwise, such error shall be rectified. And that, on the making up of every such yearly account, all interest which shall become due to the said A or B, for any sum or sums of money which they may respectively advance and bring into the said partnership, and the yearly allowance to the said A for rent, shall in the first place be deducted, and the clear profits of the said trade, after all

necessary deductions and allowances made thereout, shall be divided between them, the said A and B, according to their respective proportions of the capital of the said partnership.

17. That within the space of six calendar months after the expiration of the said term of fourteen years, or next after the determination of the said partnership, pursuant to any notice to be given by virtue of these presents,, a general account, in writing, shall be taken of all the stock, moneys, and effects, and other things remaining and being in the said joint trade or business, or owing or belonging to the said partners on account thereof; and also of all debts due or owing by the said partners to any person or persons for any matter or thing concerning the said joint trade or business, or relating thereto; and upon finishing the last-mentioned account, the partner who shall have advanced or lent any sum of money more than the other to the said copartnership, shall be paid and satisfied such sum of money as he shall have so advanced or lent more than the other, and which shall be then due, and all interest which may be due and owing to him from the copartnership or joint business, in respect thereof; and all other debts which shall be due or owing from or by the said copartnership and joint trade, shall also be satisfied and discharged; and then the residue of the effects, together with the debts and moneys due and owing to the said partnership, shall be parted and divided between the said partners, in proportion to their respective shares and interests therein. And each of the said partners shall give unto the other of them a bond in a sufficient penalty for the payment of his proportion of the debts owing by the said partnership; and well and effectually assign to and empower the other of them, his executors and administrators, to recover and receive all such credits and sums of money as shall be due and owing to him after such partition and division, and do and execute all such other acts and things as shall be necessary in order to vest the sole right and property therein in the partner to whom the same shall then belong.

18. That after such partition or division shall be made between the said partners, neither of them, his executors or administrators, shall discharge any debt or debts which shall upon the partition or division be allotted or assigned to the other of them, or in any respect interfere in the receipt or recovery thereof.

19. That, in case either of the said partners shall die before the expiration of the term of the said partnership, then the surviving partner shall, within the space of six calendar months next after the

decease of the partner so dying, settle and adjust with the representative or representatives of the deceased partner, all accounts, matters and things relating to the said partnership: And if the surviving partner shall be desirous of purchasing the share of the deceased partner of and in the property, credits, and effects of the said partnership, then the value thereof shall be ascertained by two indifferent persons, one to be chosen by the surviving partner, and the other by the representative or representatives of the deceased partner; and the surviving partner shall thereupon become the purchaser of the said share at such valuation, and shall enter into a bond, in a sufficient penalty, for securing to the representative or representatives of the deceased partner the amount of such valuation by three equal installments, at the respective periods of six, twelve and eighteen calendar months next after the decease of the partner who shall so die as aforesaid, with interest at the rate of 5*l.* per centum, per annum, from the time of such decease; and also, a bond for indemnifying the estates and effects of the deceased partner against the debts and demands due or owing by or from the said partnership, on having a proper assignment or assurance executed for vesting in the surviving partner the share of the deceased partner, and enabling such surviving partner to collect and get in all the credits and effects due, owing and belonging to the said partnership. But in case, at the decease of either of the said partners as aforesaid, the surviving partner shall decline to purchase the share of the deceased partner in manner aforesaid, then the credits and effects of the said partnership shall be collected in or converted into money, and out of the money arising therefrom, all the debts due from the said partnership shall be discharged, and the surplus or residue shall be divided between the said surviving partner and the representative or representatives of the deceased partner, in the same proportions in which the surplus or residue would have been divided between the said partners if living, at the expiration of the said partnership by effluxion of time.

20. That, in case the said A shall die before the expiration of the term of the said partnership, then the said B shall have the option of purchasing from his representative or representatives, the messuage in aforesaid, where the said business is so carried on, at the price or sum of £ , provided that the said B signify his intention of becoming the purchaser of the said messuage, to the representative or representatives of the said A, within three calendar months next after the decease of the said A; and the said B shall accept an assignment

(to be prepared at his expense), of the term of the said A in the said leasehold premises, whereof years are now expired, subject to the yearly rent of £ , without requiring the production of the lessor's title.

21. Provided, always, that if (contrary to the several agreements hereinbefore contained), either of the said parties shall neglect or refuse to attend to the business of the said partnership, or if either of the said parties shall willfully neglect or refuse to keep proper and just accounts, or, without the consent of the other, engage apprentices or servants; or employ the partnership money except on account of the partnership; or engage in any other trade; or buy or contract for any goods exceeding the value of £ ; or shall transact business, or enter into contracts with, or make advances or give credit to any person or persons after he shall be requested not to do the same; or, if (contrary to the said agreements) either of the said parties shall compound or release any debt, or sign any bankrupt's certificate, letter of license, or such other instrument as aforesaid; or draw or accept any bill or note, or contract any debt on account of the said partnership, except in the usual and regular course of the business of the said partnership, and for the benefit thereof; or shall become bail or surety for any person or persons; or shall assign his or their share or interest in the said partnership, or withdraw his share of the capital therein, or if either of the said partners shall carry on, either separately or in partnership with any other person or persons, the trade or business of a ; or shall become insolvent, or shall suffer his body to remain in execution for more than one calendar month; or shall do, commit, or permit to be done, any act, matter, or thing whatsoever, by which, or by means of which, the said partnership moneys or effects may be seized, attached, extended, or taken in execution: Then, and in any of the said cases, the other of the said partners, if he shall think fit, shall be at liberty to dissolve the said partnership, by giving to the partner who shall offend in any of the particulars aforesaid, a notice in writing, declaring the said partnership to be dissolved and determined; and the said partnership shall, from the time of giving such notice, or from any other time to be therein specified for the purpose, absolutely cease and determine accordingly; without prejudice, nevertheless, to any remedies belonging to either of the said partners for the breach or non-performance of all or any of the covenants and conditions contained in these presents, at any time or times before the determination of the said partnership. And the partner so giving

such notice of dissolution shall be at full liberty, and is hereby authorized to advertise the same in the London Gazette, without the consent of the other.

22. That in case any difference shall arise between the parties to these presents, their executors or administrators, touching the said joint trade or business, or the management of the same, or the settlement of the books and accounts thereof, or the settling, applying, or dividing any of the profits, debts, or property belonging to the said partnership or joint trade, or any other matter, cause, or thing, relative to or concerning the same, or any thing contained in these presents, and they cannot agree and determine the same between themselves, then, and in any such case or cases, the said parties, or their executors or administrators, shall forthwith nominate and appoint two disinterested persons, one of them to be chosen by each of the said parties, his executors or administrators; which two persons shall determine all such matters aforesaid, by their award in writing under their hands; and in case such persons cannot agree to determine the matters to them referred within thirty days next after such reference, then the same shall be referred to and determined by such one other disinterested person as the two first referees shall for that purpose nominate and appoint umpire in the premises, who shall determine the same by writing under his hand, within ten days next after he shall be so appointed umpire; and the said parties, their executors and administrators respectively, shall and will stand to and perform the award, arbitrament, and determination, which shall be made by the arbitrators or referees, or their said umpire, so to be elected and appointed as aforesaid, concerning the premises, without any further suit or trouble whatsoever. And it is hereby further agreed, that this submission to reference shall be made a rule of the Court of King's Bench, upon the application of either of the said parties: And also that no suit at law or in equity shall be commenced or prosecuted against the referees or their umpire, concerning any of the matters or things so to be referred to them or him as aforesaid, or concerning their or his award or determination. In witness, etc.

No. II.

Deed of Partnership between two Brewers.

This indenture made the day of , 1832, between A, of, etc., of the one part, and B, of, etc., of the other part: Whereas, by an

indenture bearing date the day of , 1820, and made or expressed to be made between L therein described of the one part, and the said A of the other part, it is witnessed that for the considerations therein mentioned, the said L did demise and lease unto the said A, his executors, administrators and assigns (all that messuage, etc.). To hold the same unto the said A, his executors, administrators, and assigns, for the term of years thence next ensuing, at the clear yearly rent of £ , payable as therein mentioned. And, whereas, the said A hath, ever since the commencement of the said lease, carried on the trade of a brewer on the said premises, and hath from time to time expended divers large sums of money amounting to £ , or thereabouts, in making new erections and buildings, alterations and improvements thereon. And, whereas, in pursuance of a power for that purpose contained in the said indenture of demise, the said A hath, with the consent in writing of the said L, agreed to admit the said B into partnership with him the said A in his said trade of brewer, in equal shares, for the whole of the residue now to come and unexpired of the said term of years; and, accordingly, by a certain instrument in writing, bearing even date with these presents, the said A and B, their heirs, executors and administrators, have become jointly and severally bound and liable for the payment unto the said L, his executors, administrators and assigns, of the said yearly rent of £ , and for the performance of all and singular the covenants contained in the said indenture of demise, as fully as if the said B were a party thereto. And, whereas, in pursuance of the said agreement for a partnership, as well the residue of the said lease now to come and unexpired, as all the said several erections, buildings, alterations and improvements so made by the said A as aforesaid, together with the good-will of the said trade, and all the engines, machinery, implements, utensils, goods, wares, malt, hops, beers, ales, horses, drays, commodities, effects, and stock of every kind, in and upon the said premises employed and used in carrying on the said trade, have been valued to the satisfaction of the said A and B at the sum of £ . And, whereas, it has been agreed that the said intended partnership shall be adjusted on the terms and in manner hereinafter mentioned. Now this indenture witnesseth, that each of them, the said A and B, for himself, his heirs, executors and administrators, doth hereby covenant with the other of them, his executors and administrators, in manner following (that is to say):

1. That the said A and B shall henceforth be and continue partners together in the trade or business of brewer.

2. That the said partnership shall commence from the day of the date of these presents, and shall endure for the residue now to come and unexpired of the said term of years, that is to say, for the full term of years, to be computed from the day of the date of these presents, if the said partners shall so long live, subject to the provisions hereinafter contained for determining the said partnership.

3. That the firm and style of the said partnership or house of trade shall be , and that the said trade or business shall be carried on under the said firm in the said brew-house, and on the several premises comprised in the said indenture of demise, and wherein the said A hath hitherto carried on the trade of brewer as aforesaid, or in such other place as the said partners shall from time to time mutually agree upon.

4. That the capital of the said partnership shall consist of the sum of £ , to be brought in by the said partners in equal shares. Provided that the said A shall be permitted to retain out of the moiety so to be brought in by him as aforesaid, the said sum of £ , as and for the purchase-money of the said lease, buildings, and other effects which have been valued as aforesaid, and which it is hereby agreed and declared shall be purchased by the said partnership. And the said partners shall stand possessed of and interested in all the capital stock and effects of the said partnership in equal shares, and shall be deemed creditors of the partnership in respect of their respective moieties of the capital, and shall be allowed thereon interest at 4*l.* per cent.

5, 6, 7. See General Precedent,[1] Clauses 5, 6, 8.

8. That all mortgages, leases, bonds, specialties and securities, and all other writings whatsoever, which shall at any time or times during the continuance of the said partnership be had, made, or taken for any houses, warehouses, vaults, cellars, or other premises, money, debts, or other matter or thing whatsoever, in anywise concerning the joint trade, shall be made and taken in the names of both the said partners.

9 to 15. See General Precedent, Clauses 9 to 15 inclusive.

16. That the cash account of the said joint trade shall be settled and balanced once in every week during the continuance of the said partnership, and the balance of the cash on hand on every such weekly settlement shall be paid in the name of the said partnership firm into

[1] Some verbal alterations are necessary.

such bankers as may be mutually agreed on as the partnership bankers, the same, nevertheless, to be drawn out for the purposes of the said partnership only by drafts or checks, to be signed by the said —— in the name of the said partnership.

17. That, if at any time during the continuance of the said partnership, any loss or damage shall happen to the said joint stock by the fraud or negligence of either of the said parties, then the party, by or through whom such damage or loss shall happen, shall make good the same within next after the discovery thereof.

18. That each of the said parties shall bring and pay into the joint stock or cash of the said partnership, all moneys as he shall receive on account thereof, and that the sums of money so to be received shall from time to time be applied in discharge of the debts that shall be due from the said joint trade.

19. That each of them, the said A and B, shall be allowed out of the said joint stock, all sums of money which he may expend in treating any of the customers of the said partnership, provided the same shall be claimed and brought to account, and entered in the expense or other proper book of the said partnership within seven days next after the expenditure thereof, but not otherwise.

20. That the said A shall be at liberty, during the continuance of the said partnership, to reside as heretofore in the said messuage, and that the rent for the same shall be payable out of the funds of the said partnership; but that the said A shall be alone liable to pay all government and parochial taxes payable in respect of the same, and shall at his own expense keep the same during such occupation in good and tenantable repair.

21. That each of the said partners shall be provided, at the expense of the said joint trade, with all such strong beer as he and his family may use and consume, and that the same shall be delivered at their respective dwelling-houses at the expense of the said partnership.

22. (Annual Account.—See Gen. Prec. 16).

23. That within the space of after the determination of the said partnership by effluxion of time, a general account in writing shall be taken of all joint stock, money, goods, effects, and things of the said partnership, and of all debts due to and from the same, and, thereupon, all and every the goods, wares, engines, machinery, implements, utensils, stock, and effects, of what kind or nature soever, belonging to and used in the said joint trade, shall be sold and dis-

posed of, and out of the moneys arising from such sale or sales, and the credits of the said partnership which have from time to time been collected and got in, all the debts due and owing by the said partnership shall be discharged, and the partner who shall have advanced or lent any sum of money more than the other to the said partnership, shall be paid and satisfied such sum of money as he shall have so advanced or lent more than the other, and which shall be then due, and all interest thereon, and the residue of the said moneys, credits, and effects shall be divided between the said parties, their executors and administrators, in equal moieties. And each of the said parties shall give unto the other of them a bond, in a sufficient penalty, for the payment of his proportion of the debts owing by the said partnership, and shall effectually assign to the other of them, his executors and administrators, all such credits and sums of money as shall be due to him on such division of the moneys and credits of the said partnership, and all other things which it shall be necessary to assign in order to vest the sole right and property therein in the partner who shall be entitled thereto, such bond and deed of assignment to be at the expense of the party requiring the same; and that, after such division shall be made between the said parties, neither of them, his executors or administrators, shall release any of the credits which shall have been assigned to the other of them.

24. That if either of the said parties shall be desirous to determine and dissolve the said partnership at any time before the expiration of the said term of years, and, of such his desire, shall give or leave six calendar months' previous notice in writing to or for the other of the said parties, at the counting-house of the said partnership, then, and in such case, the said partnership and joint trade shall cease and determine upon the expiration of the said six calendar months, or at such future day or time as shall be named in the said notice.

25. That immediately after such notice shall be given as aforesaid, a general account in writing shall be taken of all the joint stock, money, goods, effects, and things of the said partnership, and of all debts due to and from the same, and so soon as such account shall have been made, the erections, buildings, repairs, and improvements comprised in the inventory and valuation made previously to the commencement of the said partnership, and hereinbefore mentioned, and all other erections, buildings, repairs, and improvements to be hereafter made and built in and upon the said premises, comprised in the said instrument of demise, or in or upon any other premises, of

which the said partnership may, at any time hereafter during the continuance thereof, become possessed, and the good-will of the said joint trade, and the engines, machinery, implements, utensils, goods, wares, horses, drays, commodities, effects, or stock, of what nature or kind soever, then employed and used in carrying on the said joint trade, shall be valued by two proper persons to be named by the said A and B respectively, and the party to whom such notice shall have been given shall be at liberty, if he desires so to do, to take on himself the whole of the said joint trade, and, in case he shall determine so to do, then he shall pay to the party retiring and giving such notice, his executors or administrators, one moiety of the amount of the valuation so to be made as aforesaid, by equal installments, at three, five, etc., calendar months, and shall give his bond, in a sufficient penalty, for securing the payment thereof, with interest on each installment respectively, at and after the rate of 4*l.* per cent per annum. And upon the execution and delivery of such bond, the said retiring party shall and will, upon the request and at the costs of the remaining party, his executors or administrators, execute to him or them such deeds or assurance as shall be requisite, for the purpose of vesting in the said remaining party, his executors or administrators, the said retiring party's share of, and in the said joint stock, and the produce thereof.

26. That at the dissolution of the said partnership, in manner last aforesaid, the valuation of the good-will of the said trade, and of the beers, ales, malt, hops, and coals then belonging to the said copartnership, shall be made in manner following—that is to say, the good-will of the said trade shall be estimated after the rate of £ for every thousand barrels of strong beer which shall yearly, on an average of the three years then last past, have been brewed on account of the said joint trade; the stock of beer and ales then belonging to the said partnership shall be estimated at the then net selling price thereof, making and allowing an abatement or deduction at the rate of for every 100*l.*, on the whole amount of the valuation of the said beer and ales; the stock of malt, hops, and coals then belonging to the said joint trade shall be estimated at the price or prices at which the same respectively were purchased, as such price or prices shall appear by the books of the said partnership; and the valuation of all other the buildings, improvements, engines, machinery, implements, utensils, and stock, of what nature or kind soever, then belonging to the said partnership, in regard to the principle or manner

of making the same, shall be in the discretion of the persons to be chosen for the purpose of valuing the same, as aforesaid.

27. That on the dissolution of the said partnership, by the means last aforesaid, the credits then owing to the said copartnership shall be collected by the party remaining, and applied by him in discharge of the debts thereof; and such party shall, if required, give his bond, in a reasonable penalty, conditioned for applying the moneys so to be received by him, in the first place in discharge of such debts, and then in payment to the said retiring party, his executors or administrators of the share and proportion of him, the said retiring party, of and in the said credits.

28. That at the end of one year from the dissolution of the said partnership trade, by the means last aforesaid, the credits thereof then remaining unreceived by the said remaining party as aforesaid, shall be valued by two indifferent persons, to be chosen by the said parties respectively; and the said remaining party shall pay to the said retiring party, his executors or administrators, one moiety of the amount of such valuation; on which payment being made, he, the said retiring party, his heirs, executors, or administrators, shall relinquish all right and claim to any part or share in the said credits or the produce thereof, and shall and will, upon the request and at the costs of the said remaining party, his executors or administrators, by sufficient deeds or assurances, effectually assign or release all right, title, interest, claim, and demand whatsoever, therein or thereto, to the said remaining party, his executors and administrators, and shall and will give him and them full power and authority to sue for, recover, and receive all and every, or any of the said credits, in the name of the said retiring party, or by any other lawful means whatsoever, as by the said remaining party, his executors or administrators, shall be reasonably required; and, after such assignment being made, and such power being given, each of the said parties, his executors and administrators, shall, if required so to do by the other of them, his executors or administrators, give and execute to the other of them, his executors and administrators, a general release of all claims and demands whatsoever, relating to or in any ways concerning the said joint trade and partnership. And the said remaining party shall, at his own costs, give to the said retiring party his bond, conditioned to indemnify him, his executors and administrators, against all costs, charges, and expenses which may happen or be occasioned to the said retiring party, his executors or administrators, by reason of any

action or suit which may be brought by the said remaining party in the name of the said retiring party, by virtue of the power or authority to be given to him, as aforesaid.

29. That in case the said B shall die at any time before the expiration of the said term of years, leaving the said A him surviving, an estimate and valuation shall, within thirty days next after such death, be made of all the erections, buildings, improvements, engines, machinery, implements, utensils, goods, wares, stock, and effects belonging to the said joint trade, in like manner as is hereinbefore directed in pursuance of a notice to be given for the determination thereof, and that the credits due and owing to the said partnership shall be collected and received by the said A, without the interference of the executors or administrators of the said B. And that the said A shall and will pay, or cause to be paid, to the executors or administrators of the said B, his, the said B's full share of the amount of such estimate and valuation, by four equal installments, at three, six, etc., calendar months from the time of such his decease; and also his, the said B's, share of the produce of all and every the credits then due and owing to the said partnership, after full payment and discharge of all the debts owing from the said partnership, as and when the same credits shall be received, in like manner as is hereinbefore provided in case of the determination of the said partnership in pursuance of such notice as aforesaid, together with interest for such share of him, the said B, of and in the said joint stock, at and after the rate of 5*l.* per cent per annum, from the time of his decease as aforesaid; and also that he, the said A, shall and will, within the space of one calendar month next after the decease of him the said B, at the costs of the said A, execute and deliver to the executors or administrators of the said B a bond, in a reasonable penalty, with a condition for keeping indemnified the executors or administrators of the said B from all costs, damages, and expenses arising or to arise from, or on account, or by reason of the said joint trade and partnership; and also shall and will, within one calendar month next after the decease of the said B as aforesaid, duly execute and deliver, to such executors or administrators, a bond in a proper penalty, conditioned for the payment of the amount of the net part or share of him, the said B, of and in the said joint stock, according to the valuation thereof to be made in manner aforesaid, together with such interest as aforesaid and also for the payment of his, the said B's share of the produce of the credits of the said copartnership, after payment of the

debts owing therefrom, in such manner, and at such times, as is and are hereinbefore appointed for the payment thereof respectively.

30. That from and after the execution of the said bond to be given by the said A, as aforesaid, the executors or administrators of the said B shall and will, on the request and at the costs of the said A, assign, release, and discharge all right, title, interest, claim, and demand whatsoever therein, or thereto, to the said A, his executors, administrators, and assigns; and shall and will give him and them full power and authority, and assistance, for and toward the suing for, recovering, and receiving of all or any of the said credits, by permitting their names to be made use of, if necessary, or by such other lawful means as by the said A, his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably required; and the said A shall, at his own costs, execute and deliver to the said executors or administrators of the said B a bond in a sufficient penalty, conditioned to indemnify them against all costs, damages, and expenses which they may sustain or be put unto, by reason of any action or suit which may be brought by the said A in their names, by virtue of the power so to be given to him as aforesaid.

31. That if, in any case where the same shall have been given him by virtue of these presents, either of the said parties shall decline to exercise the option of taking upon himself the whole of the said trade, and of purchasing the share of the other therein, then within after any notice as aforesaid shall have been given, by virtue of these presents, a general account, valuation, sale and division of the effects, moneys, and things of the said partnership, shall take place in the same manner and to the same extent, or as near thereto as the difference of circumstances will allow, as has been hereinbefore provided for upon the determination of the said partnership by effluxion of time; and that, upon taking such account, and making such division as last aforesaid, the interest of the said parties in the residue which shall be then unexpired of the said lease, shall be accounted for and disposed of, together with and in like manner as the other effects of the said partnership, if the said L shall consent thereto by writing under his hand; but if the said L shall not give such consent, then it is hereby agreed that the said A shall continue to occupy the said premises for the residue then to come and unexpired of the said term of years, and shall alone be responsible for the payment of the rent for the residue of the said term; and shall, at his own costs, execute and deliver to the said B, his executors or administrators, a

bond, conditioned to indemnify him, the said B, his executors or administrators, against all claims, demands, damages, costs and expenses, in respect of the rent for the said messuage during the residue of the said term of years.

32. That in case the said A shall die before the expiration of the said term of years, leaving the said B him surviving, it shall be lawful for the said B, during the then residue of the said term, if he shall so long live, to carry on the said joint concern, jointly with the executors or administrators of the said A, or such one or more of the children of the said A, as he by his last will and testament in writing shall nominate and appoint, who thereupon shall, from and after the decease of the said A, be and become jointly concerned with the said B as partners in the said trade in the room of the said A: Provided that the joint trade so to be carried on by the said B jointly with the executors, administrators, child or children of A, as the case may happen, shall in every respect be under and subject to the like terms and agreements as are hereinbefore expressed and declared concerning the said partnership to be carried on by and between the said A and B, or as near thereto as the difference of circumstances will permit.

33. (Arbitration clause.—Gen. Prec., Clause 22).

No. III.

Deed of Partnership between four Bankers

This indenture, made the day of , 1832, between A, of, etc., of the first part; B, of, etc., of the second part; C, of, etc., of the third part; and D, of, etc., of the fourth part: Whereas, the said A and B have for some years past carried on the business of bankers in partnership, at : And, whereas, the said A and B are possessed of the lease of a certain messuage and premises situate at aforesaid, for the term of years, which said premises the said A and B have heretofore used for the purposes of their business as bankers aforesaid: And whereas it hath been agreed by and between the parties to these presents, that the said business which hath been so carried on as aforesaid by the said A and B, shall henceforth be continued by the said A, B, C, and D, as partners, for the residue of the said term of years, in manner hereinafter mentioned: Now this indenture witnesseth, that, in pursuance of the said agreement, each of them, the said A, B, C, and D, for himself, his heirs, executors, and admin-

istrators, doth hereby covenant, promise, and declare, with and to the others, and each and every of the others of them, their respective executors and administrators, in manner following: that is to say:

1. 2. (Gen. Prec., clauses 1, 2.)

3. That the capital of the said partnership shall consist of £ , which shall be brought in by the said parties in the following proportions: that is to say, £ , being two-thirds thereof, by the said A and B, in equal proportions, and £ , the residue thereof, by the said C and D, in equal proportions; provided that out of the said sum of £ , so to be advanced by the said A and B, the sum of £ shall be retained and accepted by them the said A and B, as and for the consideration to be paid by the said partnership for the said house and fixtures, all which effects it is hereby agreed and declared shall belong to the said partnership.

4. That each of the said parties shall at all times during the continuance of the said partnership, and at the end or sooner determination thereof, have a several right, title, and interest in and to the said capital or joint stock, including the said lease and fixtures, and all the profits thereof, and in and to all and singular the money, credits, and effects whatsoever, which from time to time shall belong to the said partnership, according to the shares and proportions in which the said sum of £ is to be advanced and made up by them respectively.

5. That the capital of the said partnership shall at all times, and from time to time during the said partnership, be continued in and employed solely for the purposes of the said partnership, and no part thereof shall be diminished or taken out of the said joint trade, or employed by any of the said partners in or for any other trade or business, or use or purpose whatsoever.

6. That the gains and profits to arise from the said partnership business shall, from time to time, except as hereinafter is mentioned, be used and employed in carrying on the said business for the benefit and advantage of the said partnership, according to the respective shares of the said partners therein, and that the said partners shall be entitled to the profits of the said business in the proportion following, namely, the said A and B to two-third parts, and the said C and D to the remaining one-third part thereof, and that all losses happening in the course of the said business shall be borne by them in the same proportions, unless, etc. (Gen. Prec., clause 5.)

7. That it shall be lawful for any of the said partners to draw out of the stock of the said partnership any sum or sums of money for

his or their own private current expenses, not exceeding the interest on his or their share of the capital of the said stock, to be advanced by him or them as aforesaid, at the rate of 5*l.* per cent per annum, and so as the capital of the said partnership, amounting to £ · as aforesaid, shall not in any manner or at any time be diminished, and so as credit for all and every the sum and sums of money to be taken out of the said capital stock by each of the said partners respectively, shall be given by the said partners respectively to the general account of the said partnership in the meantime and until the next annual account of the said partnership shall be adjusted and settled when the sums so taken or received shall be charged against the party so taking or receiving the same in manner hereinafter mentioned.

8. That the rent, taxes, and repairs of the said messuage with the appurtenances, where the said partnership shall be carried on, and of any other premises where the said partnership shall or may hereafter be carried on, and also the salary or wages of such person or persons as shall from time to time be employed in managing and carrying on the said partnership business, and all postage, and also all losses by bad debts, and all other losses, charges, damages, and expenses which shall or may happen to, or be paid, laid out, or expended by the said parties, or any of them, in and concerning the said partnership business, shall be borne and paid by and out of the said partnership effects, and the gains and profits thereof. And in case such profits shall not at the end of any one year, during the continuance of this copartnership, be sufficient to answer such payments, losses, damages, and expenses, then and in every such case the said partners shall immediately advance and pay each, according to his share of the capital, such sum or sums of money as may be required to make up such deficiency, to the intent that the stock, capital, or sum of money to be employed in the said partnership business during the term aforesaid, may not be diminished by such losses, charges, damages, and expenses.

9. That all bills, drafts, promissory notes, and all acceptances of any bills, drafts, or notes, and all indorsements thereon, and all receipts, payments, letters, or other matters and things relative to the said banking business, shall be signed only by the said C and D, or by Mr. M, one of the clerks in the said banking-house, and in case of the death or removal of any of them, then by such other person or persons as shall be appointed or substituted in their or any of their places or place by a majority of the partners for the time being.

10. That the said A and B shall not, nor shall either of them, sign any such bills, drafts, notes, or any acceptance thereof, or any indorsements thereon, negotiated from and to or in the firm of the said bank, except in the case of the said C, D, or M, being prevented by sickness or other cause from attending to the said banking business, and it being necessary for the conducting of the said banking business for the said A and B or one of them so to do, such necessity, and the length of the continuance thereof, to be judged of by a majority of the partners.

11. That the said parties shall make use of the banking-house or shop of , in London, or such other London banking-house as a majority of the partners shall think proper, for the purpose of making remittances, drawing of bills, and negotiating all other banking business necessary to be transacted there.

12. That the said A and B shall not be required to take an active part in the management of the said partnership business, but that the said C and D, as the acting partners, shall give such constant and diligent attendance as shall be necessary for the negotiating the said banking business at the said shop at , and for the more regular and orderly carrying on the same, and that the hours for transacting business at the said bank shall be fixed from nine o'clock in the morning until five o'clock in the afternoon every day (Sundays, Christmas, and Good Fridays excepted), during the continuance of the said partnership.

13. That the joint stock or capital, and all the debts, gains, and credits which shall be made, transacted, done, or given during the continuance of the said partnership, shall be regularly and fairly written in one or more book or books, to be for that purpose provided by the said partnership and kept in some convenient place where the said partnership shall be carried on, which book or books so to be kept the said partners, or such person or persons as a majority of them shall authorize to appoint, shall freely and at all seasonable and proper times, as well during the continuance of the said partnership as within after the expiration thereof, have recourse to and have liberty to peruse and inspect, and to transcribe or copy all or any part thereof, without any let, suit, hindrance, or denial of or by the other or others of them the said partners, his or their executors or administrators; provided that the said books or any of them shall not, on any such occasion, be taken or removed from the place where the said business shall be carried on during the said copartnership, and at the

expiration thereof the same book or books shall be deposited in such place for their inspection as aforesaid, as a majority of the said partners shall think proper.

14. That all bonds, bills, notes, and securities whatsoever, which shall at any time or times during this partnership be made or taken for any matter or thing concerning the said partnership business, shall be made and taken in the name of the said partnership firm.

15. That no money shall be lent or advanced to any of the said partners without the consent in writing of all the other partners being first had and obtained, and that none of the said partners shall at any time during his continuance in the said partnership, borrow, receive, or take up any money on account of the said partnership, without bringing the same into the stock of the said partnership.

16. That none of the said partners shall at any time during the said partnership, in opposition to the will or direction of the major part in number of the said partners for the time being, lend any money or effects belonging to the said partnership, or give credit on account of the said partnership to any person or persons whomsoever; or take, hire, or dismiss any clerk or servant to be employed in and about the business and concerns of the said partnership; or at any time during the said partnership, or after the determination thereof, compound or release any debt or debts, or deliver up any security, which, from time to time, during the said partnership, shall be due, owing or belonging to the said partnership, without receiving the full amount of the same debt, or an equivalent for the same, and bringing the money so received, or the amount or value thereof, into the stock and cash of the said partnership. And that each partner shall account for and pay into the stock and cash of the said partnership, the full amount of every debt which he respectively shall receive, or for which he shall, without such consent as aforesaid, give a release or discharge. And that none of the said partners shall, contrary to the will of any one or more of the others of them, after notice for that purpose, at any time speculate in the public funds or in any government security, by buying or selling, or making bargains for time, or in any other manner whatsoever, except for ready money, or subscribe any policy of insurance. And that none of the said partners shall enter into any bond, judgment, statute or recognizance; or do any act, matter, or thing whatsoever (other than and except in the fair, regular, and ordinary course of the business of a banker), by means whereof the said capital or joint stock of the said partnership, or any part thereof, or

any money, credits, or effects, belonging, due, or owing to the said partnership, may be seized, attached, or taken in execution.

17. That, in all questions, differences, or disputes which may happen to arise between the said partners for the time being, touching or concerning the said joint concern, or the management or regulation thereof, or any act, transaction, matter, or thing relating thereto, the voice and determination of the major part in number of the said partners for the time being, shall be final and conclusive on the other of the said partners for the time being, unless the other of them shall be desirous of submitting the determination of the matters in difference to arbitration, pursuant to the provision hereinafter contained in that behalf, and within three days after such determination of the major part of the partners for the time being shall be communicated to him, shall require a reference to arbitration upon the same; in which case the determination which shall be made upon such reference to arbitration, shall be final and conclusive between the parties).

18. (Annual account.—Gen. Prec., cl. 16, with slight variations.)

19. That, upon the expiration of the said partnership by effluxion of time, a general account or rest in writing shall be made and taken by and between the present or any surviving or continuing partners of all and singular the money, credits, estate, and effects whatsoever, which shall be due, owing, or belonging to the said partnership, and also of all debts due and owing by or from the said partnership to any person or persons whomsoever. And that upon the closing and settling accounts, such the said partners shall forthwith pay, or make provision for the speedy payment and satisfaction of their respective shares of all such debts then owing by the said partnership, as can or may be immediately discharged, and shall lay out and invest in the purchase of the capital stock in the 3*l.* per cent Consolidated Annuities, in the joint names of some trustee or trustees to be appointed by them, so much money as shall be sufficient to answer, pay and satisfy all outstanding notes, and other debts given, issued, and owing by or from the said partnership, as cannot be immediately discharged as aforesaid; and shall from time to time sell and dispose of a sufficient part of the said stocks or funds for the discharge of all the said outstanding notes, and such other debts as last mentioned, when and as the payment of the same notes and debts respectively shall be demanded or required; and upon the expiration of the said partnership, shall cause the lease of the said house in to be forthwith sold by public auction, for all the estate and interest of the said partners

therein; and also sell and dispose of all other articles and utensils belonging to the said partnership, and divide between them, according to their respective shares therein, on the expiration of the said partnership, all the money arising from the sale of the said lease, and other articles, and also all other the moneys, credits, estates, and effects whatsoever, belonging or owing to the said partnership, after the discharge of all the outstanding notes and debts of the said partnership, or making provision and setting apart a fund for answering and paying the same as aforesaid; and that immediately after such partition and division shall be made, the said surviving and continuing partners shall reciprocally assign unto each other the respective shares which shall be allotted to them respectively in and out of the said credits, sums of money, and other effects of the said partnership, with full power and authority to recover and receive the same, such assignments to be prepared by, and at the expense of the partners respectively taking the same; and that after such partition or division shall be made, neither of the said surviving partners, his executors or administrators, shall or will release or discharge the credits which shall be allotted to the other or others of them, without the consent of the person or persons respectively to whom the same respectively shall be allotted, his, her, or their executors or administrators.

20. That, if any of the said partners shall die before the expiration of the said partnership, the executors, administrators, or assigns of such deceased partner, shall have and receive from the surviving partners or partner, interest after the rate of 5*l.* per cent per annum, for the capital sum or stock which such deceased partner had in the concern, the interest to be computed from the day of (the day of settling the annual account), preceding his decease, in lieu of any profits that may have accrued since such day of ; and that such capital and interest shall be paid at the times and in the proportions following (that is to say), one-third part thereof, with lawful interest as aforesaid, at the end of six calendar months from the time of the death of such partner or partners; one other third part thereof, with the like interest, at the end of nine calendar months from the time of the death of such partner or partners; and the remaining third part thereof, with the like interest, at the end of twelve calendar months from the time of the death of such partner, and in full of such deceased partner's right and property in the said joint stock or capital, gains, profits and effects, and that the executors or administrators

of such deceased partner shall have no right or power to scrutinize or look into the books of the said concern. Provided, always, that if such deceased partner shall have kept a private account with the said bank, in the same manner as any customer thereof, then the surviving partners or partner shall furnish the executors or administrators of such deceased partner with a copy of such private account, for the year in which such partner shall have died.

21. That all debts owing by any partner dying, on account of the said partnership, shall be paid in full to the death of such partner, when and as the same shall become due, or as soon after as the payment of the same shall be demanded; and the surviving partners or partner shall, by a bond or obligation in a sufficient penalty, become jointly and severally bound to the personal representative of the deceased partner, for the payment of the said outstanding debts within the period of from the time of the decease of such partner, and also for the indemnity of the personal representative, and the estate and effects of the said deceased partner of, from, and against the said debts and all actions and suits at law and in equity, on account of the same.

22. That in case any one or more of the said partners shall neglect or refuse to bring into the said partnership stock his or their share or respective shares of and in the said capital of £ , on or before the day of next, or if, etc. (Pursue the several preceding covenants, or such of them as may be thought necessary, as in Gen. Prec., cl. 21, and then proceed), then and in every such case, the partner or partners so offending shall, upon notice in writing being given to him or them to that effect, be discontinued and expelled from the said partnership in as full a manner as if he or they had not been named a joint partner or partners.

23. That upon the expulsion of any partner or partners as aforesaid, a general account shall be taken of the credits and effects of the said partnership, and the debts of the said partnership shall be discharged up to the period of such expulsion, and the continuing partners or partner shall pay to such expelled partner or partners, his or their share or respective shares of the said capital, with interest, at such times and in such manner as are hereinbefore respectively mentioned, in the case of payment to the personal representatives of a deceased partner or partners; and also shall execute to such expelled partner or partners, a bond of indemnity of like nature, and for like purposes as are hereinbefore mentioned in regard to the bond to

be given to the personal representatives of a deceased partner or partners.

24. That when any one or more of the said partners shall die or be dismissed from the said partnership, the lease of the house and other premises in which the banking business shall be carried on shall remain and become the property of the surviving or continuing partners in the same proportions in which they shall be entitled to the future profits of the said partnership as aforesaid.

25. That when and so soon as the said partnership shall be determined as to any one or more of the said partners, by his or their death, or by his or their being dismissed from the said partnership before the expiration of the said term of years, then the original and also the derivative and additional share or shares of and in the said partnership concern, of such partner or partners respectively, shall belong to the surviving or continuing partners in proportion to their original shares in the capital of the same partnership; and the surviving or continuing partners shall, in the same rate or proportion, replace and supply the part or share, or several parts or shares, of and in the capital stock of the said partnership amounting to £ as aforesaid, which shall be drawn from the said partnership by or on the account of the partner or partners so dying or dismissed respectively, his or their respective executors or administrators.

26. (Arbitration clause.)

No. IV.

Deed of Partnership between two Attorneys.

This indenture made the day of , etc., between A, of, etc., attorney at law and solicitor, of the one part, and B, of, etc., attorney at law and solicitor, of the other part: Whereas the said A and B have mutually agreed to enter into partnership as attorneys and solicitors, for the term and under the stipulations hereinafter mentioned: Now this indenture witnesseth, that, in pursuance of the said agreement and in consideration of the sum of £ of lawful English money, by the said B to the said A in hand well and truly paid (as and by way of premium for the said intended partnership) immediately and before the sealing and delivery of these presents, the receipt of which said sum of £ he, the said A, doth hereby acknowledge,

and of and from the same, and every part thereof, doth acquit, release, and discharge the said B, his heirs, executors and administrators, forever by these presents, each of them the said A and B doth hereby for himself, his heirs, executors and administrators, covenant and declare with and to the other of them, his executors and administrators, in manner following (that is to say):

1. That they the said A and B shall be and continue partners in the profession or business of attorneys at law, solicitors and conveyancers, for the term of fourteen years from the date hereof, if they the said A and B shall so long live.

2. That the said partnership business shall be carried on under the firm or style of Messrs. A & B, at the dwelling-house and office of the said A at aforesaid, until otherwise agreed upon by the said parties.

3. That the capital of the said partnership shall consist of the sum of £ , and of such other sum and sums of money as shall from time to time be wanted for carrying on the said business with facility and advantage, and the same shall be brought in by the said partners in the following proportions, namely, the sum of £ , being two-thirds thereof by the said A, and the sum of £ , being the remaining one-third part by the said B, and the said sums so to be advanced by the said partners, respectively, shall be paid by them into the bank of Messrs. , at, etc., to the credit of the said partnership, on or before the day of .

4. That if either of the said partners shall at any time or times advance or pay to or for the use or benefit of the said partnership, any sum or sums of money beyond the proportion which he ought to contribute, then the partner so advancing such sum or sums of money shall be paid and allowed interest thereon after the rate of £5 per cent per annum, before any division of profits shall be made.

5. That the said partners shall be entitled to the profits of the said business in the proportions following: namely, the said A to two-third parts, and the said B to the remaining one-third part thereof; and that all and every sum and sums of money which shall, at any time during the continuance of the said partnership, be received as a fee or fees with any articled clerk or clerks to be taken by either of the said parties, shall be shared between the said parties in like proportions.

6. That all losses happening in the course of said business, etc., (Gen. Prec., Clause 5.)

7, 8. (Gen. Prec. Clauses, 7, 8; including, in the latter, stipulations as to expenses of stationery, copying clerks, counsels' fees, etc.)

9. That, in case the profits arising from the business of the said partnership, including fees with any articled clerk to be taken, or other extra fees or gratuities paid to the said partners on the joint account of the said partnership (after deducting thereout the rent so payable to A as aforesaid, and all the expenses of the said partnership), shall not at the end of the first three years of the said term, if both the said partners shall then be living, amount to the sum of £ , being the calculated average value of three years' profits of the said partnership: then the said A shall repay to the said B so much of the said sum of £ , advanced by way of premium as aforesaid, as shall make the profits of the said B equal to one-third of the said sum of £ (the average value).

10. That if both, or either of them, the said A and B, shall die before the expiration of the said first three years of the said partnership term, then the said A, his executors or administrators, shall and may retain the whole of the said premium or sum of £ .

11, 12. (Gen. Prec., Clauses 9, 10.)

13. That neither of them, the said A and B, shall or will at any time during the said partnership carry on, prosecute, or defend any action or suit at law or in equity, or transact any agency or other business incident to the profession of an attorney, solicitor, or conveyancer, for any profit or advantage on his own separate account, or in any other manner than for the joint benefit of the said A and B, and that neither of the said parties shall undertake the prosecution of any cause or suit, after he shall be required by the other of the said parties not to do the same.

14. (Gen Prec., Clause 15.)

15. (Gen. Prec., Clause 16, with slight variations.)

16. That immediately upon the dissolution of the said partnership by effluxion of time, during the lives of both the said partners, a general account in writing shall be stated and settled between the said parties of all the debts due from and to the said partnership, and of all the affairs and transactions thereof; and upon the completion of such account, the said parties shall forthwith pay or provide for the payment of their respective shares of the debts owing by them in respect of the said partnership, and, after payment of such debts, shall make a distribution, division, and allotment of the partnership property, credits, and effects between them according to their

several proportions and interests therein; and the deeds, papers, writings, vouchers, and documents belonging or which shall relate to the affairs of the clients of the said partnership, shall be retained by or delivered to each of the said parties, in manner following; that is to say, such of them as shall belong or relate to the affairs of any clients who shall have been obtained through the interest of A, shall be retained by the said A, unless the said clients shall object thereto; and such of them as shall belong to or relate to the affairs of any clients who shall have been obtained through the interest of B, shall be retained by the said B, unless the said clients shall object thereto; and in case any dispute shall arise as to the custody of the papers in any particular business, it shall be referred to the client to whose business they relate, to determine to which of the said partners the said papers shall be delivered.

17. That in case either of the said partners shall die during the said partnership, the survivor shall be at liberty to take at a fair valuation, to be made by some indifferent person to be appointed by such survivor and the executors or administrators of the deceased partner, the furniture, books, and all such other things as shall have been used in the said partnership, and are not included in the said lease to A as aforesaid, provided that payment be made for the same within calendar months after the decease of the said partner: And on such payment being made, the executors or administrators of the said deceased partner shall assign or otherwise make over the said furniture, books, and things unto the said survivor at the expense of the latter.

18. That immediately upon the dissolution of the said partnership, by the death of either of the said partners as aforesaid, an account in writing shall be taken by the surviving partner, and the executors or administrators of the deceased partner, of all the credits and effects of the said partnership, and of the debts due from the said partnership, according as the same shall stand at the day of such partner's decease; and the surviving partner shall proceed with all convenient speed to collect and get in the credits of the said partnership; and after paying thereout all and every sum and sums of money owing by the said partnership, shall, from time to time, as often as the moneys in his hands shall amount to the sum of £ , pay over and account with the executors or administrators of the deceased partner, for their share or proportion thereof; and so soon as the whole of the share of such deceased partner shall have been paid to

his executors and administrators as aforesaid, they, the said executors and administrators, shall duly assign and release unto such survivor, all the right, title, and interest of them, the said executors and administrators, in and to the premises.

19. That the expense of winding up and adjusting the said accounts and the collection and receipt of the said credits, upon the decease of any partner as aforesaid, shall be paid out of the funds of the said partnership; and that in case there shall be any deficiency in the said moneys, credits, and effects of the said partnership, to pay and satisfy the debts which shall be due and owing from the same, such deficiency shall be paid by the surviving partner and the representatives of the deceased partner in the same proportions, in which such surviving and deceased partner (if living) would have been bound by virtue of these presents to contribute to the losses of the said partnership.

20. That in case the said B shall at any time after the expiration of four years from the commencement of the said partnership be desirous to retire from the same, and of such his desire shall give twelve calendar months' notice in writing to the said A, then and in such case the said partnership shall cease and determine upon the expiration of the said twelve calendar months, or at such day subsequent thereto as shall be named in the said notice: And so soon as the said B shall have retired from the said partnership in pursuance of such notice, an account shall be taken of the debts, credits, and effects of the said partnership, in like manner as is hereinbefore directed in the event of either of the said parties dying during the continuation of the said partnership; and the said A shall take upon himself to collect and get in the credits of the said partnership, and shall pay and discharge the debts thereof, and, after payment thereof, shall pay over and assign one-third of the surplus of the moneys and effects of the said partnership which shall remain after payment of such debts, from time to time, as and when the moneys and effects so received shall amount to £ , unto the said B, his executors or administrators; and so soon as the whole of the share of the said B shall have been paid to him as aforesaid, he, the said B, shall duly assign and release unto the said A all the right, title and interest of him the said B in the premises: And in case there shall be any deficiency in the said moneys, credits, and effects of the said partnership to pay and satisfy the debts which shall be due and owing from the same, such deficiency shall be paid by the said A & B according

to their several proportions of and in the profits and losses of the said partnership, as settled by these presents.

21. That in case of such dissolution by the retirement of the said B as aforesaid, all and every the papers, books, and writings which shall relate to the general business of the said partnership, shall be retained by the said A, he, the said A, indemnifying the said B, his executors and administrators, from and against all damages, costs, and charges which he, the said B, his executors or administrators, may sustain or be put to by reason of his, the said B's, delivering up and permitting the said A to retain the said papers, books, and writings as aforesaid.

22. That in case of such dissolution by the retirement of the said B as aforesaid, he, the said B, shall not nor will at any time or times hereafter, during the life of the said A, set up business as an attorney or solicitor, either by himself or in partnership with any person, within fifty miles of aforesaid (the place of A's residence), whether the said A shall continue to reside and practice at , or shall remove to and practice at any other place within the said county of , and that in case he, the said B, shall willfully or negligently break or fail to perform this present covenant, then he, the said B, his heirs, executors, or administrators, shall and will immediately thereupon pay unto the said A, his executors or administrators, the sum of £ , as liquidated damages, to be deemed and taken in full satisfaction and discharge of such covenant, and not in the nature of a penalty.

23. Provided, always, that if, contrary to the several agreements hereinbefore contained, either of the said partners, etc. (See Gen. Prec., clause 21.)

24. (Arbitration Clause.)

No. V.

Deed of Partnership between two Farmers.

This indenture, made the day of , etc., between A, of, etc., of the one part, and B, of, etc., of the other part: Whereas, by an indenture bearing date, etc., and made or expressed to be made between the [lessor], of the one part, and the said A of the other part; the said [lessor] did, for the considerations therein mentioned,

demise unto the said A, all that, etc. (describe parcels); To hold the same unto the said A, his executors, administrators and assigns, from the day of then last, for the term of sixteen years, under the yearly rent of £ , payable half-yearly as therein mentioned, and under such further contingent yearly sums, and subject to such provisos, covenants, conditions, and agreements as are therein contained: And, whereas, the said A is possessed of or entitled to a considerable stock upon the said farms, consisting of horses, carts, wagons, cows, oxen, crops upon the land, implements, utensils of husbandry, and other articles and things: And, whereas, it hath been agreed between the said A and B, that the said farm shall from the day of now next ensuing, during the then residue of the said term of sixteen years, by the said indenture of lease granted as aforesaid, be managed and cultivated by the said A and B for their mutual benefit and advantage, and that they shall be equally entitled to the clear gains and profits to arise from and be produced by the said farms, under and subject to the conditions, stipulations, and agreements hereinafter contained: Now this indenture witnesseth, that in pursuance of the said agreement, each of them, the said A and B, doth hereby, for himself, his heirs, executors, and administrators, covenant and declare with and to the other of them, his executors and administrators, in manner following (that is to say):

1. That the said A and B shall and will (if they shall both be living on the 29th day of September next ensuing) become and be beneficially interested in the gains and profits to arise from and to be produced by the said farms and premises hereinbefore mentioned and comprised in the said recited indenture of lease in equal shares and proportions from the 29th day of September next ensuing the date hereof, for and during the residue which shall be then to come and unexpired of the said term of sixteen years, by the said indenture of lease granted as aforesaid; subject to the proviso hereinafter contained for determining the said joint concern, either upon the death of both of them, the said A and B, during the said term, or in consequence of the death of the said A during the life-time of the said B, and of such notice being given or left by the said B as hereinafter mentioned; and that the said farms, lands, and premises shall, during that period, be managed, cultivated, and superintended for their mutual benefit and advantage.

2. That the said B shall, upon the 29th September next ensuing, pay or cause to be paid to the said A the sum of 500*l.*, of, etc., as or

by way of premium or consideration for the admittance of the said B into the said joint concern, and that, over and above the sum of money hereinafter stipulated to be advanced by the said B, as his share of the capital of the said joint concern.

3. That the stock, both live and dead, of and belonging to the said A, which shall be upon the said farm and premises upon the 29th of September next ensuing, shall, upon that day, or as soon as may be then after, be valued and appraised either by the said parties, or, in case they differ, by two indifferent persons, one of whom shall be chosen by the said A and the other by the said B, within next after the said 29th September next; and, in case such two referees shall also differ, then by such one person as they, the said referees, shall for that purpose, appoint.

4. That the crops growing upon the said farms on the 29th September next, and also the improvements made by the said A upon or in respect of the said lands, farms and premises since the day of , in the particulars following, viz.: in laying manure upon the said lands, in hedging and ditching, fallows, etc., shall be considered as part of the said stock so to be valued as aforesaid, and shall be included in such valuation as aforesaid.

5. That immediately after such valuation shall be made as aforesaid, the said B shall pay or cause to be paid unto the said A so much good and lawful money of Great Britain as shall be equal in value to one moiety or half part of such stock, according to the valuation or appraisement to be made thereof as aforesaid; but, in case the value of such moiety shall exceed the sum of 1,500*l.* of like money, then the said B shall not be compelled or compellable to pay unto the said A more than the sum of 1,500*l.*, immediately upon such valuation being made as aforesaid, and, in case the said B shall not then pay more than the said sum of 1,500*l.*, the remainder of the amount of the value of the said moiety or half part of such stock shall be considered as a debt due from the said B to the said A, bearing interest from the said 29th September next, after the rate of 5*l.* for every 100*l.* by the year, which interest shall be paid to the said A, by equal half-yearly payments, and shall be a charge upon the share of the said B, of and in the gains and profits of the said farms and premises, and the principal of the said debt shall be paid by the said B to the said A, upon the said A going to the said B, or leaving at his place of residence or abode for the time being, six calendar months' notice in writing, requiring the said B to pay the said debt, and specifying the

day on which it is or ought to be paid. And, in case no such notice shall be given or left during the said joint concern, then such debt and all arrears of interest thereof shall be paid by the said B, his executors or administrators, to the said A, his executors or administrators, as soon as may be after the end or determination of the said joint concern.

6. That each of the said parties shall have a several right in a moiety of the said stock, and that the same stock shall, from time to time, during the said joint concern, be continued or employed in or upon the said premises, and for the cultivation and improvement thereof, and no part thereof shall be used for any other purpose.

7. That the stock of, or belonging to the said A shall, at the time of the valuation thereof, amount in value to the sum of 3,000*l.* at the least.

8. That the clear gains or profits of, or to arise from the said farms and premises shall be divided between the said parties in equal shares and proportions. Nevertheless, during the first year of the said joint concern, neither of the said parties shall draw or receive from the said clear gains or profits, or his share or proportion thereof, more than the sum of 150*l.*, and, if the clear gains and profits of, or to arise from the said farms and premises during the first year of the said joint concern shall exceed the sum of 300*l.*, then the surplus thereof shall be added to the capital stock of, or belonging to the said joint concern, and shall be considered as part thereof.

9. That each of them, the said parties, shall contribute toward the payment of the rents reserved upon the lease under which the said premises are holden, and also toward keeping up the live and dead stock upon the said farm, and also toward payment of all expenses and losses which shall or may be incurred or sustained for or by reason or on account of the said farms and premises, and the management and cultivation thereof, in equal shares and proportions.

10. That the said A shall reside at, and live in and have the sole use and occupation of the messuage, tenement and farm house called , in exclusion of the said B, and the said A shall pay to the said joint concern the annual sum of £ by way of rent for the same, for the payment of which said yearly sum of £ , the share of the said A of, and in the gains and profits of the said joint concern, shall be considered as primarily liable.

11. That the said A shall be paid and allowed out of the gains and profits of the said joint concern the yearly sum of £ for each

workman, husbandman or laborer to be employed with the consent of the said B for the purposes of the said joint concern, whom he shall board or lodge in the said messuage, tenement or farm-house, called .

12. That the crops now being in or upon, and which shall, on or before the 29th September next, be got in, to, or produced from the said farm and premises, shall be considered as the whole and exclusive property of the said A.

13. That, in the cultivation, management and improvement of the said farm, each of the said parties shall, during the continuance of the said joint concern, use his best and utmost endeavors, and shall not, nor will, willingly or knowingly, make, do or suffer any act or thing which may amount to or be construed as a breach of any of the said covenants and agreements contained in the said recited indenture on the part of A to be kept, done and performed.

14. That neither of the said parties shall, without the consent of the other of them, take or receive any apprentice, nor hire, employ or engage any servant, husbandman, workman or laborer, in or about the said joint concern.

15. That in case either of the said parties shall, at any time or times during the said joint concern, enter into any bond, or become bail or surety with or for any person or persons whomsoever, or confess any judgment, or authorize the signing or entering up of the same without the consent of the other of them first had or obtained in writing; or sell, or contract to sell or deliver, by way of trust or credit, any of the joint stock, produce or articles to the amount of £ , or upwards, of or belonging to the said joint concern, to any person or persons whom the other of the said parties shall forewarn not to be trusted, or do or suffer any other act, matter or thing, whereby or by reason or means whereof the said farms and premises, or any part thereof, or the said joint concern, or the share or interest of either of the said parties therein shall be seized or attached, arrested, taken in execution, charged, assessed, or otherwise prejudiced; then, and in any of the said cases, it shall be lawful for the other of the said parties, if he shall think fit, within three calendar months after the discovering thereof shall be made to him, to dissolve and determine the said joint concern, by giving notice in writing for that purpose to the offending party within the said three calendar months, and immediately after such notice shall be given, the said joint concern shall cease and determine, and in that case the final account shall be had and taken, and

all other matters and things shall be done as are hereinafter directed to be made and done at the end of this copartnership.

16. That neither of the said parties shall or will at any time or times during the continuance of the said joint concern, without the consent of the other of them in writing for that purpose first had and obtained, be directly or indirectly concerned in, or use, exercise, or follow any trade, business, or concern whatsoever, other than and except the said joint concern.

(17. Annual account. Gen. Prec., Clause 16.)

18. That in case both of them, the said A and B, shall die before the expiration of the said term of , granted by the said recited indenture of lease, then immediately after the decease of the survivor of them the said joint concern shall cease.

19. That in case the said B shall depart this life before the expiration of the said term, leaving the said A him surviving, then, and in such case, the said A shall and will, during the then residue of the said term, if he shall so long live, carry on the said joint concern jointly with the executors or administrators of the said B, or such other person or persons as he, by his last will and testament, or any writing by him duly executed in the presence of, and attested by, two or more credible witnesses, shall nominate and appoint in that behalf, who shall thereupon accordingly, from and after the decease of the said B, be and become jointly concerned with the said A in the said farms and premises in the room and stead of the said B, under and subject to the like terms, conditions, provisos, and agreements as are herein expressed and agreed upon between the said parties hereto, in case they were both living, or as near thereto as circumstances will permit; save only, that in case the share or proportion of the executors or administrators, or other person or persons appointed by the said B as aforesaid, of, or in the said stock of the said joint concern, shall become less than the share or proportion of the said A therein, then such executors or administrators, or other person or persons as aforesaid, shall only have and be entitled to receive a part or share of the said gains and profits of the said joint concern, in proportion to his, her, or their share of the capital thereof, as aforesaid. And save only, that such executors or administrators, or such other person or persons as aforesaid, shall not personally attend in or to the management or cultivation of the said farms or premises, and save and except that the said A, in consideration and in recompense of, and for the extraordinary care and trouble in the management and cultivation of the said

farms and premises, with the executors or administrators of the said B, or with such other person or persons as he shall appoint in that behalf as aforesaid, shall from and after the decease of the said B, during the then residue of the said term, if the said A shall so long live, have and receive the yearly sum of £ , by and out of the share of the said B, his executors, administrators, or appointees, of and in the clear gains and profits of the said farms, premises, and joint concern.

20. That in case the said A shall depart this life during the said term, leaving the said B him surviving, it shall be lawful for the said B, at any time within six calendar months next after the decease of the said A, to dissolve and determine the said joint concern, by giving or leaving notice in writing within that time, to or for the executors or administrators of the said A, at the said messuage or dwelling-house called , signifying the wish or desire of the said B to dissolve and determine the said joint concern; but, in case the said B shall not give or leave such notice within the time aforesaid, then and in such case the said B shall and will during the then residue of the said term, if he shall so long live, carry on the said joint concern with the executors and administrators of the said A, who shall thereupon accordingly, from and after the decease of the said A, be and become jointly concerned with the said B in the said farm and premises, in the room and stead of the said A, under and subject to the same terms, conditions, provisos, and agreements as are herein expressed and agreed upon between the said parties hereto, in case they were both living, or as near thereto as circumstances will then permit.

21. Provided always, that in case the said B shall survive the said A, and the said A shall die without having or leaving an executor or administrator that shall be capable of holding and occupying the said demised premises and every part thereof, or who shall not continue to hold and enjoy the same, and every part thereof, pursuant to the terms of the said recited indenture of lease, then, either upon the decease of the said A in the life-time of the said B, without having or leaving an executor or administrator capable of holding or occupying the said demised premises, or upon such executors or administrators not continuing to hold or enjoy the same, as the event may be, the said joint concern shall cease and determine.

22. That at the end of the said term granted by the said recited indenture of lease, or at the sooner determination of the said joint concern in any of the events hereinbefore mentioned, the said parties

respectively, or their respective executors and administrators, shall and will, within then next following, meet and account together, and make, cast up, state, and adjust the final account and reckoning in writing of, and concerning the said joint concern, and of all stock, moneys, debts, goods, gains, profits, and advantages which shall be then in, or due, owing, or belonging to the said joint concern, or to the said parties or their respective representatives for, or by reason, or on account thereof, and of, for, or concerning all debts or sums of money, which, by reason or means of the said joint concern, shall be due or owing to any person or persons, or which they, the said parties, or their respective representatives, shall have sustained, for, or by reason or means, or on account thereof, so and in such sort that it shall thereby appear what the then state and condition of the said joint concern shall be; and immediately thereupon, or as soon afterward as conveniently may be, true payment and satisfaction shall be made, or good order taken for the true and speedy payment and satisfaction of all such debts and sums of money as at the determination of the said joint concern shall be by the said parties due and owing to any person or persons for or on account of the said joint concern. And then, also, true payment, division, and delivery shall be made between the said A and B, in equal shares and proportions, of all and every the stock, moneys, debts, goods, and other things which, after such payments as aforesaid, shall be then due, owing, or belonging to the said joint concern, or to the said parties, or their respective representatives, on account thereof. And thereupon each of the said parties, his executors or administrators, shall make and give unto the other of them, his executors or administrators, such assignment of his part or share of the debts which shall be then due to the said joint concern, together with full power to sue for and recover such debts as the party who is to have the same shall upon such division as aforesaid reasonably require, and after such partition, division, and assignment shall be made, neither of the said parties, his executors or administrators, shall or will receive, release, compound for, or discharge any debt or debts which shall be allotted to the other of them, his executors or administrators, without the consent of the party to whom the same shall be allotted.

23. Provided always, that in case the said A, his executors or administrators, shall upon the determination of the said joint concern be desirous of purchasing all or any part of the share or proportion of the said B, his executors or administrators, of or in the

said joint stock, goods, and effects, it shall be lawful for him, the said A, his executors or administrators, so to do, upon giving unto the said B, his executors or administrators, notice in writing of such his wish or desire within one calendar month next after the determination of the said joint concern, and in case the said parties shall differ as to the value or price to be given for the share or part of the share of the said B, his executors and administrators, of and in the said joint stock and effects so to be purchased, then the said share or part of the share of which such notice shall be given for the purchase thereof as aforesaid, shall be valued and appraised by two indifferent persons, one of whom shall be chosen by the said A, his executors or administrators, and the other by the said B, his executors or administrators, and in case such two persons shall differ in their valuation, then the same shall be valued by such one person as the said two referees shall for that purpose appoint, and the said A, his executors or administrators, shall thereupon pay to the said B, his executors or administrators, such sum of money for the purchase thereof as the said two referees or their umpire shall determine to be the value thereof.

24. (Arbitration Clause.)

No. VI.

Deed of Partnership between two Haberdashers.

This Indenture, etc. Whereas, M S hath for many years carried on the business of haberdasher and milliner in a house or shop at D, and hath lately retired from the said business. And whereas the said E S and M K have purchased all the stock in trade, effects, and good-will of the said business, and, in payment for the same, have given to the said M S six joint and several promissory notes, signed by each of them, the said E S and M K, and payable at, etc., respectively. And whereas the said E S and M K have agreed to become partners in the trade or trades, and upon the terms and agreement hereinafter mentioned: Now this indenture witnesseth, that each of them, the said E S and M K, for herself, her heirs, executors and administrators, doth hereby covenant, promise, and agree, to and with the other of them, her executors and administrators, mutually and reciprocally, by these presents, in manner following (that is to say):

1. That they, the said E S and M K, shall and will become and be copartners in the trade or business of silk-mercers, haberdashers,

linen-drapers, and milliners, and in all matters and things incident thereto, from the day of the date of these presents, for the full term of twenty-one years thence next ensuing, determinable, nevertheless, as hereinafter mentioned.

2. That the said trade or business shall be carried on under the firm of "S & K," at the house and shop of D, where the same has heretofore been carried on by the said M S, or at such other place or places as the parties hereto shall for the time being mutually agree upon.

3. That the stock in trade, articles, and effects belonging to the said business, and now in and about the said shop and premises, shall be and remain the joint property of the said parties hereto in equal undivided shares, and that the six several before-mentioned promissory notes given to the said M S for the said stock shall, as the same respectively become due, be paid by the said E S and M K, in equal proportions, and be accounted as part of the disbursements of the said partnership business.

4. That all sums of money which shall be necessarily disbursed and expended for the payment of rent, taxes, and rates, and for the purchase of stock in trade, and for the providing all coals and candles, and for the wages and maintenance of all apprentices, servants, assistants, workwomen, and others used and employed, retained, hired, or taken for the carrying on of the said business, and for the joint use and service of the said E S and M K and all other necessary and proper expenses connected with the said partnership business, shall be advanced and paid by the said parties hereto in equal proportions, and that if either of the said parties shall advance any sum or sums beyond the other of them for the purchase of any stock in trade or effects, or for the general purposes of the said business, the stock in trade and effects which shall be so purchased shall immediately become and remain the joint property of the said parties hereto, but interest at the rate of *5l.* per cent per annum shall be paid and allowed to either of the said partners, who shall so advance any sum beyond the other of them.

5. That the said E S and M K shall be entitled to the net gains and profits of the said partnership business, and to the premiums of all apprentices taken by them, or either of them, in equal shares and proportions.

6. That proper books of accounts shall be kept by the said parties hereto, and true and perfect entries made therein of all receipts and

disbursements, and of all goods bought and sold, and other business transacted by them respectively, or by any agent, apprentice, or servant in their employment, and of all moneys, debts, and other things relating to the business; and that all such books of accounts shall be kept at the shop or place where the said business shall be carried on, and that each of the said parties shall at all times have free access thereto, to inspect, examine, cast up, and make entries therein, or extracts or copies therefrom.

7. That each of the said parties shall be just and true to the other of them, and shall devote her whole time and attention to the said partnership business, and use her best endeavors at all times to promote the interest thereof; and that neither of them shall, during the continuance of this partnership, exercise or carry on, or be concerned, directly or indirectly, in carrying on the business of a silk mercer, hosier, linen-draper, haberdasher, and milliner, or any or either of such trades, either wholesale or retail, except for the benefit of the said partnership; nor shall either of them give away, lend, or employ any of the goods or moneys belonging to the said partnership, nor engage the credit thereof in any manner howsoever, except upon account and for the sole use and benefit of the said partnership, in the usual way of business.

9. That neither of the said parties shall become bail in any court whatever, nor become bail to the sheriff, nor give any undertaking for that purpose, without the consent in writing of the other of them; and shall not hire or engage in, or discharge from their joint employment any apprentice or servant, without their mutual consent.

10. That if either of the said parties hereto shall give credit to any particular person or persons, contrary to the wish of the other of them in writing declared, the party so giving credit shall alone bear the loss and hazard thereof; and the share of such party in the profits of the said partnership business shall stand charged therewith, but all profits which shall arise from such credits shall, nevertheless, be deemed part of the partnership profits, and accounted for accordingly.

11. That on the 29th day of September next ensuing the date hereof, and on every succeeding 29th day of September, during the continuance of the partnership hereby established, and also as soon as conveniently may be after the expiration thereof, or after the determination thereof by the death of either of the said parties, a full and general account in writing shall be made and taken by the said E S and

M K, or between the survivor of them and the executors and administrators of the deceased partner, of all the business which shall have been transacted by the said partnership, and of all moneys, debts, and other things due and owing to and from the said partnership business; and the heads of such accounts, when settled and digested, shall from time to time, during the continuance of the said copartnership, be entered in two books, to be signed by both of the said partners; and that, after such signing, each of the said partners shall retain one of such books in her custody; and after completing such accounts, the net gains and profits which shall appear to be due to each party shall be paid to her, or her executors or administrators accordingly.

12. That if either of the said parties hereto shall, during the continuance of this partnership, draw, accept, or indorse any note or bill of exchange in the joint names of the said copartnership, or otherwise pledge the credit of the said copartnership for her own private or separate debts or engagements, or for any purpose unconnected with the ordinary business of the said copartnership, without the consent in writing of the other of such parties, or shall do, or knowingly suffer to be done, any act, matter, or thing whereby the said partnership effects, or any part thereof, shall be seized, attached, extended, or taken in execution, or shall in any other respect be guilty of a willful or notorious breach of any of the covenants, stipulations, and agreements herein contained; then, and in every such case, it shall be lawful for the other of them, at any time within three calendar months next after such offense or default, to dissolve and determine the copartnership hereby established, by giving notice in writing of her determination to that effect to the party so offending, or by leaving the same at her last known place of residence. And immediately after such notice being so given or left as aforesaid, the said partnership shall be dissolved and determined to all intents and purposes; and the party so dissolving the said copartnership shall be exclusively entitled to wind up and settle the affairs and accounts of the said copartnership, accounting for the remaining share and interest of the other parties in the partnership effects, after deducting a full compensation for all loss and inconvenience which shall have been sustained in consequence of any such offense, default, or breach as aforesaid. And the party giving such notice shall alone be entitled to retain possession of the said shop and premises, and carry on business therein, paying the

rent, and performing the covenants to which the same premises shall be liable.

13. That if, at any time during the copartnership, it shall be found expedient or advisable to take or rent the said messuage or tenement, shop and premises, or any part thereof, or any other messuage, shop, and premises, for any term of years, for the purposes of the said business, the same shall be taken and rented in the joint names, and for the mutual benefit of the said parties hereto as joint tenants, during their joint lives, and to the survivor of them; and if it should happen that the said partnership, by means of the notice hereinbefore and hereinafter mentioned, should be determined or dissolved, the party receiving such notice shall, upon the request, and at the cost and charges of the other party, assign all her right, term, and interest in the said messuage or tenement, shop and premises, so as to vest the same in the party giving such notice and dissolving the partnership as aforesaid, for her sole use and benefit, subject to the rents and covenants to which the same premises shall have been theretofore liable.

13. That if either of the said parties hereto shall marry during the said partnership, and the husband of the party so marrying shall meddle or interfere with the said partnership business, or any money or effects of the said copartnership, or any matter relating thereto, or do or commit any act whereby, or in consequence whereof, the business of the said copartnership may be prejudiced, or any property or effects of the said copartnership may be taken in execution, or either of the said parties may be prevented from observing or performing any of the covenants or agreements contained in these presents, then it shall be lawful for the other of the said parties to put an end to this partnership, by giving notice in writing of her intention so to do, and to wind up and settle the partnership accounts and affairs in the same manner as is hereinbefore declared in case of a willful or notorious breach of any of the covenants, stipulations, and agreements herein contained.

14. That if either of the said parties hereto shall be desirous of withdrawing from the said copartnership at any time after the first seven years thereof, it shall be lawful for her so to do, upon giving to the other of the said parties three calendar months' notice, in writing, of such her desire; and thereupon the accounts and affairs of the said partnership shall, within the said three months from the date of such notice, be made up and settled, and the party so withdrawing

shall, if required so to do, and without any fine, premium, or increased rent, assign all her right and interest to and in the same premises to the remaining or continuing partner; and after such settlement of accounts, and the expiration of the said three months' notice, the partnership hereby established shall cease and determine.

15. (Arbitration clause.)

No. VII.

Appointment of a Clergyman as Editor of certain Periodical Publications, with a salary and a share of the profits.

This indenture made the day of , 1839, between A, of, etc., and B, of, etc., being the joint publishers of certain periodicals and other publications, under the style and firm of A & B, of the one part, and the Reverend S I of, etc., of the other part: Whereas a partnership lately subsisted between H, of, etc., and the said A under the style and firm of H & A, for the purpose of publishing certain periodical publications entitled respectively, "H's Portraits of Eminent Statesmen," and "Beechy's Cabinet of Gems," and the said partnership hath lately been dissolved. And whereas, by an indenture bearing even date herewith, but executed immediately before the execution of these presents, and made between the said H of the first part, the said B of the second part, the said A of the third part, and the said Reverend S I of the fourth part (being the indenture declaring the dissolution of the said partnership of H & A), the share and interest of the said H of and in the goods, chattels, moneys, credits, rights and advantages of the said partnership, was duly assigned by the said H to the said B, in consideration, among other valuable considerations therein mentioned, of the sum of 2,000*l.* therein expressed to be secured by several bills of exchange drawn by the said S I, upon and accepted by the said A and B, and indorsed by the said S I, delivered by the said B to the said H, and bearing even date with the said indenture, such bills of exchange being for the sum of £ each, and payable to the said H, or his order, at months after date respectively. And whereas the said bills were drawn and indorsed by the said S I for the accommodation of the said B in order to enable him to purchase the share of the said H in the said partnership, which he hath accordingly done by the means of the said bills. And whereas the said A and B have agreed to become partners under the

firm of A & B, in the business or trade of printers and publishers in general, and likewise as printers and publishers of certain periodical works which bear or are intended to bear the following titles respectively, namely, "H's Portraits of Eminent Statesmen, "Beechy's Gems," "Portraits and Memoirs of Archbishops," etc. And whereas, in pursuance of the said agreement between the said A and B, an indenture of partnership bearing even date with these presents, hath been duly executed between them whereby the said partnership of A & B is constituted for the term of twenty-one years, determinable at the expiration of the first seven or fourteen years of the said term upon six calendar months' notice, and likewise determinable upon the death of either party, and whereby, among other things, it is declared and agreed that the capital of the said partnership shall consist of the copyright of and in the works and publications hereinbefore mentioned, stock in trade, goods, chattels, credits and effects of the said late firm of H & A, including the lease of certain apartments, being the ground floor in the house No. Regent street, wherein the business of the said last-mentioned firm was carried on, together with the furniture and fixtures therein. And whereas, in consideration of the purchase by the said B of the said share of the said H, as aforesaid, by means of the said bills of exchange so drawn by him, the said S I, and likewise in consideration of the joint use and employment of the said share by the said firm of A & B, for the purposes of the said partnership, and likewise in consideration of the assignment hereinafter contained on the part of the said S I, of five-sixth parts of the copyright of the several works hereinafter mentioned or referred to, the said A & B have agreed to employ the said S I, as the editor of certain of the said publications already published, and also of other publications to be published by the said firm, at the salary and under the stipulations and conditions hereinafter mentioned, and have likewise agreed to indemnify the said S I by the means hereinafter mentioned against the non-payment by the said B of the said bills of exchange, or any of them, when the same shall become due and payable. Now this indenture witnesseth, that, in consideration of the premises, they, the said A & B, do hereby jointly and severally for themselves, their heirs, executors and administrators, covenant, promise and agree with and to the said S I, his executors, administrators and assigns, in manner following (that is to say), that they, the said A & B, shall and will during the continuance of the said partnership, and in case of the dissolution of the said partnership as aforesaid,

then that the party or parties who shall continue the business thereof shall and will employ the said S I, and no other person or persons, unless with his consent as the editor of the following works, namely, "H's Portraits of Eminent Statesmen," "Portraits and Memoirs of Archbishops," etc., and likewise as editor of all periodical and other works to be published by the said firm of A & B, which do or shall or may consist of or relate to religious, ecclesiastical, classical, or academical subjects, or shall consist of illustrations of plates or engravings upon such subjects, the duties of such editor being to write and compose certain observations by way of illustrations of the said plates and engravings. And also, that they, the said A and B, or the party or parties so continuing the said business as aforesaid, shall and will so long as the said S I shall continue in his situation of editor as aforesaid, and well and truly perform the duties thereof, allow and pay to the said S I a fixed salary at the rate of 200*l.* per annum, to be paid and payable by quarterly payments as hereinafter mentioned, and likewise an additional salary to be equal in amount to one-sixth part of the profits of the said partnership of A & B, as the same profits shall be ascertained on the day of in every year during the continuance of the said partnership, such last-mentioned salary to be paid and payable to the said S I from time to time within one calendar month after every successive day of ; and, also, that they, the said A & B, or the party or parties so continuing the said business as aforesaid, shall and will, so long as the said salary of 200*l.* per annum shall be payable to the said S I by virtue of these presents, well and truly pay the same from time to time without any deduction or abatement whatsoever, by equal quarterly payments, on the first day of every third calendar month succeeding the day of the date hereof in the year (the first of such quarterly payments to be made on the day of now next ensuing), at the said messuage, No. Regent street, or at any other house where the business of the said partnership shall be carried on; and, also, shall and will, so long as the said additional salary shall be payable to the said S I by virtue of these presents, well and truly pay the same from time to time, without any deduction or abatement whatsoever, on the 31st day of every December in each succeeding year, at the place aforesaid, the first of such last-mentioned payments to be made on the 31st day of December now next ensuing; and in case it shall happen that any quarterly portion of the said annual salary of 200*l.*, or any part of the said additional salary, shall respectively be in arrear and

unpaid by the space of fourteen days next after any of the aforesaid days wherein the same ought to be paid as herein provided, it shall be lawful for the said S I, his executors or administrators, to enter the said apartments and premises, No. Regent street aforesaid, or any other premises where the said partnership shall or may for the time being be carried on, and distrain for such arrears, and the distress and distresses then and there found, to take and carry away and keep or otherwise to sell and dispose thereof, as landlords may in the case of arrears of rent; and by means of such distress and sale as aforesaid, to satisfy himself or themselves the amount of such arrears of salary and all expenses occasioned by the non-payment thereof: And, also, that they, the said A & B, or the party or parties so continuing the said business as aforesaid, shall and will, from time to time and at all times during the continuance of the said partnership, permit the said S I at all seasonable hours to inspect as well the books of account of the said partnership, as all letters, accounts, vouchers, receipts, memorandums, and other documents relating to the said partnership, which from time to time shall be in the possession of the said partners, party or parties, or any or either of them: Provided that nothing hereinbefore contained shall be deemed or construed to give to the said S I a specific share of or specific lien upon the profits of the said partnership, so as to make him a partner therein; or any specific lien or claim upon the said profits whatsoever, further than he may be entitled to under the said power of distress for recovering the arrears of the said annual and additional salary: And the said S I, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree with and to the said A & B, and the survivor of them, and the executors and administrators of such survivor, that he, the said S I, shall and will, so long as he shall continue in the situation of editor as aforesaid, well, diligently, and truly perform the duties thereof according to the true intent and meaning of these presents, and in particular shall and will complete the editorial illustration of six parts of the "Portraits of Eminent Statesmen," and also six parts of the said works entitled "Portraits and Memoirs of Archbishops," etc., in every year at such periods as the said A & B shall fix for that purpose, so that a part of each of the said works may be published every alternate month, and in default thereof shall forfeit all quarterly payments which shall be due in respect of the said annual salary of 200*l.* during the time of such default, and in lieu thereof shall be paid only according to the quantity of work actually performed by him

(that is to say), in the proportion of 100*l.* for six parts of each work which shall have been completed by him, such 100*l.* being the full estimated payment for the editorial portion of such six complete parts: And, also, that he, the said S I, shall and will, during the time he shall be editor as aforesaid, complete the editorial illustration of all works requiring the same quantity of letter-press (reckoning by pages) as the said "Portraits of Eminent Statesmen," within the period and according to the stipulations hereinbefore contained relative to the said work: Provided, always, that the said S I shall not be called upon by the said A & B, or by the party or parties continuing the said business as aforesaid, to prepare for publication in any one year, either in the way of illustration of plates or otherwise, more manuscript than shall be sufficient when printed to complete eighteen sheets of a quarto volume, printed in large pica, and twenty-four sheets of an octavo volume printed in small pica: Provided, also, that in case the said S I shall fall into ill health, and shall produce the certificate of a physician of the College of Physicians in London that he is not in a proper state to pursue the duties of his said editorship, it shall be lawful for the said S I to cease from his duties, and thereupon to appoint some fit and proper substitute for him as such editor as aforesaid, to be approved of by the said A & B, and to be paid and remunerated by the said S I, without being required to forfeit any quarterly portions of the said salary of 200*l.* which may become due during that interval, or any portion of the said additional salary; provided that if the said illness shall exceed three calendar months, the said S I shall be paid thereafter until he shall be able to resume his duties only for the work he shall actually perform, the same being estimated according to the mode hereinbefore prescribed in regard to his default of editing the said six parts of the said H's "Portraits of Eminent Statesmen," etc. And this indenture further witnesseth, that, in further pursuance of the said agreement, and in consideration of the covenants hereinbefore and hereinafter contained on the part of the said A & B, he, the said S I, hath bargained, sold, assigned, transferred, and set over, and by these presents doth bargain, sell, assign, transfer, and set over unto the said A & B, their executors, administrators, and assigns, five-sixth parts or shares (he, the said S I, retaining possession and enjoying the remaining one-sixth part or share) of and in the copyright of the literary portion of the several works hereinbefore mentioned or referred to respectively, entitled "H's Portraits of Eminent Statesmen," "Por-

traits and Memoirs of Archbishops," etc., and all and singular the works which shall or may hereafter be published by the said A & B, or any other party or parties who for the time being shall or may carry on the business of the said partnership, to hold the said five-sixths parts or shares of the said copyright, and all the profits, benefits and advantages thereof, unto the said A & B, their executors, administrators and assigns, for and during and unto the full end of the term of twenty-one years, to commence from the day of the date hereof; and the said A & B do hereby jointly and severally, for themselves, their heirs, executors and administrators, covenant, promise and declare, with and to the said S I, his executors, administrators and assigns, that they, the said A & B, or one of them, shall and will take up and fully pay, satisfy and discharge the said bills of exchange and every of them, when and as they respectively shall become due and payable; and also that each of them, the said A & B, shall and will execute a joint and several warrant of attorney, bearing even date with these presents, authorizing certain attorneys therein respectively named, to enter upon record, judgment against them jointly as copartners in trade, and each of them individually, in Her Majesty's Court of Queen's Bench, at the suit of the said S I, for the sum of 4,000*l.*, and costs of suit, on which said warrant of attorney it is hereby agreed and declared that judgment shall be forthwith entered up, and that execution shall be issued on such judgment in case default shall be made in payment of any of the said bills of exchange in manner aforesaid, according to the true intent and meaning of these presents. In Witness, etc.

No. VIII.

Deed of Partnership in a Colliery.

This indenture, made the day of , between John Cole, of , in the county of , Esq., of the one part, and John Church, of , in the county of , Gentleman, of the other part: Whereas, by an indenture of demise, bearing date the day next before the day of the date of these presents, and made or expressed to be made between Sir Henry Hartley, therein described, of the one part, and the said John Cole and John Church, of the other part, the said Sir Henry Hartley hath, for the considerations therein

mentioned, demised, leased, and to farm let, unto the said John Cole and John Church, their executors, administrators and assigns, all those mines, beds or delphs of coal, already opened or hereafter to be opened, lying and being within and under the lands of the said Sir Henry Hartley, situate in the manors, towns, parishes, fields, precincts or territories of Singleton, Windgrave, etc., and any parishes, townships and places adjacent thereto, in the said county of , and in a plan to the said indenture annexed more particularly described or referred to, with all and singular the appurtenances, together with full power, license and authority, to and for the said John Cole and John Church, their executors, administrators and assigns, to enter upon the said lands and premises, and to open, sink, dig, drive, work, and make any pits, shafts, adits and drains under the said lands (except as therein is excepted), for the purpose of searching and working the said mines, delphs and beds of coal, together with other powers, authorities and privileges incidental to the working of collieries, but with certain reservations therein particularly mentioned ; to hold the said mines, beds or delphs of coal, with the liberties, powers and privileges thereinbefore demised, except the mines, beds or delphs of coal under the lands respectively called the manor of Winthrop and lands in Wilton, north of the road from to , and colored yellow, and the powers and privileges applicable to the said excepted lands, unto the said John Cole and John Church, their executors, administrators and assigns, as tenants in common, from the day of the date of the said indenture and demise, for and during the term of forty-two years, determinable as therein mentioned; and to hold the said mines, beds and delphs of coal under the lands respectively called the manor of Winthrop and lands in Wilton, colored yellow, together with all and singular the powers, liberties and privileges thereinbefore mentioned and contained, applicable to the said last-mentioned mines, unto the said John Cole and John Church, their executors, administrators and assigns, as tenants in common, from the day of the date of the said indenture, for and during the term of twenty years, determinable as therein mentioned, and also upon certain events mentioned in the said indenture ; to hold the said last-mentioned beds or delphs of coal, collieries, powers and privileges for and during the term of twenty-two years, to commence from the expiration of the said term of twenty years ; and the said John Cole and John Church have, by the said now reciting indenture, jointly and severally, for themselves, their heirs, executors and administrators,

covenanted, promised and declared with and to the said Sir Henry Hartley, his heirs and assigns, that they, the said John Cole and John Church, their executors, administrators and assigns, shall and will, within two calendar months after the execution of these presents, upon a site to be jointly fixed by the mineral agent of the said Sir Henry Hartley, his heirs or assigns, and the said John Cole and John Church, their executors, administrators and assigns, sink one pit or shaft in or upon the said land and premises described in the said plan, for working and getting the Blackgang bed of coal, with other necessary pumping and engine or other shafts, and continue to work and pursue the said pits or shafts in an efficient and workmanlike manner until a colliery shall be established upon the said site, and shall and will, in an efficient and wormanlike manner as aforesaid, continue to work the said colliery, and shall and will, in the course of working the said shaft and colliery, proceed as speedily as possible to the said Blackgang bed of coal, and shall and will, by the ways and means aforesaid, raise and get such a supply of coal as shall, within five years after the execution of the said now reciting indenture, be sufficient to produce in and for each and every year up to that period, at least the fixed rent of 600*l.* per annum; and, further, that, in case the said pit or shafts and colliery, having been fairly and truly, and in a proper and workmanlike manner, carried to the said Blackgang bed of coal, it shall, thereupon, appear that the mines, beds or delphs of coal, which shall be found in the said pits or shafts, are incapable of being worked to the advantage of the said John Cole and John Church, their executors, administrators or assigns, they, the said John Cole and John Church, their executors, administrators or assigns, shall and will, immediately after such failure shall have been ascertained (the truth and reality of such failure being, if necessary, the subject of arbitration as in the said indenture mentioned), sink one other working pit or shaft, and other similar shafts as aforesaid within said premises, upon another site to be jointly fixed as aforesaid, and work a colliery therein; and thereupon, all the stipulations and agreements thereinbefore contained, relative to the time and manner of working the said first-mentioned pits or shafts and colliery, shall be in all respects applicable to the said second-mentioned pits or shafts and colliery. And whereas, by a certain other indenture, bearing even date with the said last-recited indenture of lease, and made between the said Sir Henry Hartley of the one part, and the said John Cole and John Church of the other part, the said

Sir Henry Hartley hath covenanted to grant to the said John Cole and John Church a lease or leases of the ironstone in and under the lands where the said beds of coal are leased, or certain parts thereof, if the same leases shall be required by the said John Cole and John Church, at such rents, for such terms, and under such conditions as in the said indenture contained and provided. And whereas the said John Cole and John Church have agreed to carry on the working of the said mines and collieries, or such of them as shall be found advantageous, in copartnership; and also the said mines of ironstone, if at any time hereafter any lease shall be made to them pursuant to the said lastly recited indenture, in equal shares, for the term of forty-two years, to commence as from the day of the date of the said indenture of demise, upon the terms and conditions hereinafter mentioned and declared. Now this indenture witnesseth, that each of them, the said John Cole and John Church, for himself, his heirs, executors, and administrators, doth hereby covenant with the other of them, his executors and administrators, in manner following (that is to say):

1. That all and singular the said mines, beds, or delphs of coal, collieries, hereditaments, and premises, hereinbefore respectively mentioned or referred to, and to which the said John Cole and John Church, their executors, administrators, and assigns, are entitled as tenants in common under and by virtue of the said indenture of demise, for the said terms of forty-two years, twenty years, and twenty-two years, from the day of the date of the said indenture of demise; and the said mines of ironstone, if any such lease or leases shall be granted as aforesaid, shall thenceforth, during such of the said respective terms in which they are respectively comprised, but subject to the covenants, provisos, and agreements hereinafter contained, be worked, carried on, used, and enjoyed, by and under the direction and for the mutual benefit of the said John Cole and John Church, their executors, administrators, and assigns, as copartners in working the said mines and collieries, and in selling the coals, coke, and ironstone to be gotten and made from the same, in equal shares, the executors, administrators, or legatees of a deceased partner, or the assigns of a living partner, having power to become partners with the surviving or continuing partner or partners, in manner and under the restrictions and conditions hereinafter mentioned.

2. That in case, during the first five years of the said respective terms of forty-two years and twenty years, or during a shorter period, if a shorter period shall be found sufficient for that purpose, the said

Sir Henry Hartley shall bear, pay, and contribute one-third part of all the expenses which shall be incurred in carrying into execution the covenant hereinbefore mentioned to be contained in the said indenture of demise, so far as relates to opening, setting on foot, and establishing the colliery on the Blackgang bed, comprised in or referred to and contemplated by the said covenant; then, after the expiration of the said five years, or sooner if the said covenant shall be sooner carried into execution to the extent aforesaid, it shall be lawful for the said Sir Henry Hartley, provided he shall make his claim within one year after the expiration of the said five years at the latest, to claim to be admitted as a partner with the said John Cole and John Church in the said copartnership, and he shall accordingly be admitted as such partner, and shall thenceforth be interested in a one-third part or share of, and in the said partnership, the said John Cole and John Church, their executors, administrators, or assigns, being respectively interested each in one other third part or share thereof; but in case the said Sir Henry Hartley shall not be minded, or claim to become such partner as aforesaid, then, upon his request in writing made to the said John Cole and John Church, their executors, administrators, or assigns, within one year after the expiration of the said five years, or sooner if the said covenant shall have been sooner, to the extent aforesaid, carried into execution (or without his request in case he shall not make such request within the first year after the said five years as aforesaid), a just and true account and valuation shall be taken and made (and, if necessary, by the arbitrators hereinafter appointed) of all and singular the moneys which shall have been expended by the said Sir Henry Hartley during the said five years, or such shorter period, in carrying the said covenant into execution as aforesaid, and the person or persons making such valuation shall have full power and discretion to take into their consideration the profit and loss which shall have accrued during the said five years, or such shorter period as aforesaid, in carrying the said covenant into execution, and to what extent the sums which they shall find to have been advanced by the said Sir Henry Hartley as aforesaid, shall be deemed to have been increased or diminished with reference to such profit and loss; and the amount which the person or persons making the said valuation shall find to be due to the said Sir Henry Hartley, shall be forthwith paid to him by the said John Cole and John Church, their executors, administrators, and assigns. And it is hereby further agreed and declared, that in case the said Sir Henry Hartley shall die within

Sir Henry Hartley hath covenanted to grant to the said John Cole and John Church a lease or leases of the ironstone in and under the lands where the said beds of coal are leased, or certain parts thereof, if the same leases shall be required by the said John Cole and John Church, at such rents, for such terms, and under such conditions as in the said indenture contained and provided. And whereas the said John Cole and John Church have agreed to carry on the working of the said mines and collieries, or such of them as shall be found advantageous, in copartnership; and also the said mines of ironstone, if at any time hereafter any lease shall be made to them pursuant to the said lastly recited indenture, in equal shares, for the term of forty-two years, to commence as from the day of the date of the said indenture of demise, upon the terms and conditions hereinafter mentioned and declared. Now this indenture witnesseth, that each of them, the said John Cole and John Church, for himself, his heirs, executors, and administrators, doth hereby covenant with the other of them, his executors and administrators, in manner following (that is to say):

1. That all and singular the said mines, beds, or delphs of coal, collieries, hereditaments, and premises, hereinbefore respectively mentioned or referred to, and to which the said John Cole and John Church, their executors, administrators, and assigns, are entitled as tenants in common under and by virtue of the said indenture of demise, for the said terms of forty-two years, twenty years, and twenty-two years, from the day of the date of the said indenture of demise; and the said mines of ironstone, if any such lease or leases shall be granted as aforesaid, shall thenceforth, during such of the said respective terms in which they are respectively comprised, but subject to the covenants, provisos, and agreements hereinafter contained, be worked, carried on, used, and enjoyed, by and under the direction and for the mutual benefit of the said John Cole and John Church, their executors, administrators, and assigns, as copartners in working the said mines and collieries, and in selling the coals, coke, and ironstone to be gotten and made from the same, in equal shares, the executors, administrators, or legatees of a deceased partner, or the assigns of a living partner, having power to become partners with the surviving or continuing partner or partners, in manner and under the restrictions and conditions hereinafter mentioned.

2. That in case, during the first five years of the said respective terms of forty-two years and twenty years, or during a shorter period, if a shorter period shall be found sufficient for that purpose, the said

Sir Henry Hartley shall bear, pay, and contribute one-third part of all the expenses which shall be incurred in carrying into execution the covenant hereinbefore mentioned to be contained in the said indenture of demise, so far as relates to opening, setting on foot, and establishing the colliery on the Blackgang bed, comprised in or referred to and contemplated by the said covenant; then, after the expiration of the said five years, or sooner if the said covenant shall be sooner carried into execution to the extent aforesaid, it shall be lawful for the said Sir Henry Hartley, provided he shall make his claim within one year after the expiration of the said five years at the latest, to claim to be admitted as a partner with the said John Cole and John Church in the said copartnership, and he shall accordingly be admitted as such partner, and shall thenceforth be interested in a one-third part or share of, and in the said partnership, the said John Cole and John Church, their executors, administrators, or assigns, being respectively interested each in one other third part or share thereof; but in case the said Sir Henry Hartley shall not be minded, or claim to become such partner as aforesaid, then, upon his request in writing made to the said John Cole and John Church, their executors, administrators, or assigns, within one year after the expiration of the said five years, or sooner if the said covenant shall have been sooner, to the extent aforesaid, carried into execution (or without his request in case he shall not make such request within the first year after the said five years as aforesaid), a just and true account and valuation shall be taken and made (and, if necessary, by the arbitrators hereinafter appointed) of all and singular the moneys which shall have been expended by the said Sir Henry Hartley during the said five years, or such shorter period, in carrying the said covenant into execution as aforesaid, and the person or persons making such valuation shall have full power and discretion to take into their consideration the profit and loss which shall have accrued during the said five years, or such shorter period as aforesaid, in carrying the said covenant into execution, and to what extent the sums which they shall find to have been advanced by the said Sir Henry Hartley as aforesaid, shall be deemed to have been increased or diminished with reference to such profit and loss; and the amount which the person or persons making the said valuation shall find to be due to the said Sir Henry Hartley, shall be forthwith paid to him by the said John Cole and John Church, their executors, administrators, and assigns. And it is hereby further agreed and declared, that in case the said Sir Henry Hartley shall die within

the said five years, or such shorter period as aforesaid, and his executors or administrators shall, within six calendar months after his decease, give notice in writing to the said John Cole and John Church, their executors, administrators, or assigns, of their intention to continue to share in the said expenses, then, all and singular the clauses, provisos, covenants, matters, and things in this article contained, shall, as far as circumstances permit, be applicable to, be made available by, and obligatory upon the executors or administrators for the time being of the said Sir Henry Hartley. Provided that nothing herein contained shall be deemed to entitle the said Sir Henry Hartley to receive more than the sums actually advanced, with interest, at the rate of 5*l.* per cent, from the time they shall respectively have been advanced.

3. That the said copartnership business shall be carried on under the style or firm of "The Singleton Coal Company."

4. That on the 1st day of December now next ensuing, the sum of 1,050*l.* shall be paid into the bank of Messrs.——, of——, as and for the first installment of such capital as is requisite for the good and efficient working the said mines and collieries, and carrying on the said partnership business; out of which, the sum of 500*l.* shall be set apart, and left in the hands of the said Messrs.——, as and for the standing cash capital, to be employed for the purposes aforesaid; and such further installments of capital as shall be required for working the said collieries and mines, and partnership concerns, shall be contributed by the said John Cole and John Church in equal moieties; or in case the said Sir Henry Hartley shall be minded to share in the expenses aforesaid, then by the said John Cole, John Church, and Sir Henry Hartley, in equal third parts or shares; and in case after the expiration of the said five years the said Sir Henry Hartley shall elect to become a partner with the said John Cole and John Church, in manner hereinbefore mentioned, the capital which shall then have been contributed shall continue to be the capital of the said copartnership, until the same or any part thereof shall by agreement in writing between or among the copartners for the time being, or a majority of them in value, be withdrawn from the said partnership concern; but in case the said Sir Henry Hartley shall decline to enter into the said copartnership as hereinbefore mentioned, and shall elect to receive back the moneys which shall have been advanced by him for his share of the capital, upon an account and at a valuation to be taken and made in manner hereinbefore provided for, then the

amount of moneys which shall be received by him on the footing of such account and valuation as aforesaid, shall be replaced by the said John Cole and John Church, or other the partners for the time being, according to their respective shares in the said partnership concern; and the moneys so replaced, together with the moneys which shall have been advanced by the said John Cole and John Church, their executors, administrators, or assigns, shall be the capital of the said copartnership, until the same or any part thereof shall by agreement, as hereinbefore mentioned, be withdrawn from the said partnership concern.

5. That the capital of the said copartnership shall at all times be continued in and employed solely for the purposes of the said copartnership, and that, unless by special agreement in writing under the signatures of the said John Cole and John Church, or other the partners for the time being, or the majority of them, in value, no part of such capital shall be diminished or withdrawn from the said partnership concern, or employed by the said partners in or for any other trade or business, or use or purpose whatsoever.

6. That during the first five years of the said terms of forty-two years and twenty years, the standing cash capital to be employed for the purpose aforesaid shall amount at least to the said sum of 500*l.*, and in case the said cash capital shall at any time be reduced, by means of payments on account of the said undertaking, below the said sum of 500*l.*, such deficiency shall, within the space of one calendar month after the same shall have taken place, be supplied by the said John Cole and John Church, their executors, administrators, or assigns, in equal moieties; or in case the said Sir Henry Hartley shall have agreed to share in the expenses aforesaid, then by the said John Cole and John Church, or their respective executors, administrators, or assigns, and the said Sir Henry Hartley, in equal third parts or shares.

7. That in case, after the expiration of the said five years, any further sum or sums of money over and beyond the capital already contributed, shall in the judgment of the said John Cole and John Church, or other the partners for the time being, or the majority in value of them, be required for the purposes of the said copartnership, the same shall be advanced by all the copartners for the time being of the said copartnership, according to the shares and proportions in which they shall respectively be entitled to, or interested in, the said copartnership.

8. That during the five years of the said terms of forty-two years and twenty years, all the gains and profits which shall arise from or be produced by the said collieries and premises, or joint concern, shall, as they arise and are received, be paid into the said banking-house of Messrs.——, or into such other banking-house as shall from time to time be for that purpose appointed by the said John Cole and John Church, their executors or administrators, or by them and the said Sir Henry Hartley, as the case may be, to the intent that the same may go in the first place to keep up the standing cash capital of the said copartnership, and, subject thereto, be applied and disposed of as any gains and profits are hereafter disposable, which accrue after the said five years.

9. That after the expiration of the said five years, the gains and profits to arise from the said copartnership business shall, from time to time, except as any portions of the same shall be agreed to be drawn out as in the next article is mentioned, be used and employed in carrying on the said business for the benefit and advantage of the said copartnership, according to the respective shares of the said partners therein; and that subject to any alterations which may be occasioned by the admission of the said Sir Henry Hartley into the said partnership, as hereinbefore mentioned, or by the assignment by him, or the said John Cole or John Church, of their respective shares in the said copartnership as hereinafter mentioned, the said John Cole and John Church shall be entitled to the profits of the said copartnership, in equal moieties, and shall bear all losses happening in the course of the said copartnership business, in the same proportions.

10. That it shall be lawful for either of them, the said John Cole and John Church, or any other person, who shall be a partner under and by virtue of these presents, after the expiration of the said five years, to draw out of the stock of the said partnership, any such sum or sums of money for his own use, as from time to time shall be mutually agreed upon, by writing under their respective signatures; so as the standing cash capital for the time being of the said partnership shall not in any manner or at any time be reduced below the said sum of 500*l.*, and so as credit for all and every the sum and sums of money to be taken out of the said capital stock by each of the said partners, respectively, shall be given by the said partners to the general account of the said partnership in the meantime, and until the next annual account of the said partnership shall be adjusted and settled;

when the sums so taken or received, together with interest thereon, shall be charged against the party so taking or receiving the same, in manner hereinafter mentioned. (See *post*, Article 18.)

11. That the rent and taxes payable for and in respect of the said mines and collieries, and also all repairs which shall from time to time be done, or be necessary or required to be done for good management, to the machinery, buildings, engines, roads, and other partnership property, matters, and things used in and about the said mines, collieries, or other premises where the said partnership shall be carried on, and all outlay in works or other matters, the constructing, carrying on, and executing whereof is made obligatory on the lessees of the said mines and collieries by virtue of the said indenture of demise, or which is necessary for the prosperous and effectual carrying on of the said partnership, or made obligatory on the partners for the time being of the said mines and collieries by virtue of any clause or proviso herein contained, and all expenses whatsoever incurred in carrying on the said partnership, including the expense of cultivating any farm which shall be used for the purpose of the said partnership, and also all losses by bad debts and all other losses, charges, damages, and other expenses which shall or may happen to or be paid, laid out, or expended by the said parties, or any of them, in and concerning the said partnership business, shall be borne and paid by and out of the said partnership effects, and the gains and profits thereof, and in case such profits shall not at the end of any one year during the continuance of this copartnership be sufficient to answer such payments, losses, damages, and expenses, then and in every such case the partners for the time being shall immediately advance and pay each according to his share of the capital, such sum or sums of money as may be required to make up such deficiency to the intent that the capital for the time being of the said partnership business may not be diminished by such losses, charges, damages, and expenses.

12. That all bonds, bills, notes, and securities whatsoever which shall, at any time or times during the said partnership, be made or taken for any matter or thing concerning the said partnership business, shall be made and taken in the name of the said partnership firm, and that all checks drawn upon the bankers of the said firm shall be signed by them or their duly authorized agent; provided that so long as the said agent shall be authorized to sign the said checks, it shall not be competent for either or any of the said partners for

the time being to sign the same, but the said agent shall alone have authority for that purpose.

13. That no person who shall be a partner under and by virtue of these presents, shall or may lend or advance any sum or sums of money to any person or persons whomsoever, for or on account of the said joint concern without the consent in writing of his copartner or a majority in value of the copartners.

14. That no person who shall be a partner as aforesaid, shall or will at any time, without the consent in writing of his copartner or a majority in value of the copartners first had and obtained, draw, accept, indorse, or negotiate any bill or bills of exchange, or any promissory note or notes of hand, or any other security or securities in the name or names, or on behalf of his copartner or copartners, or so as to make his copartner or copartners subject or liable to the payment of any sum or sums of money not in the ordinary course of the said partnership business, nor do or willingly suffer to be done any act or thing whatsoever, whereby or by reason or means whereof the said joint concern, or the capital or joint stock, debt, and effects thereof, or any part thereof respectively, shall or may be incumbered, prejudiced, or affected.

15. That no person who shall be a partner as aforesaid shall, except with the consent of their copartners and the said Sir Henry Hartley, his heirs and assigns, embark in any other coal partnerships which shall use the ——— Railway for the conveyance of their coals.

16. That all necessary books of account shall be provided at the expense of the said joint concern in which shall be written or entered a just, true, and particular account of all sums of money received and paid, and of all debts which shall be contracted, and of all other matters and things in anywise conducive to the manifesting the state and condition of the said copartnership, and the collieries, mines, and premises, and that the same books, together with all vouchers and writings relating to and concerning the said joint concern, and also the lease and all other deeds relating to the said copartnership, shall be lodged and deposited for safe custody in the principal counting-house of the said copartnership firm, or in such other place or places as shall be hereafter for that purpose agreed upon by the said partners respectively, or a majority of them, for the time being, and shall at all times remain and be open and extant for the inspection of the said partners respectively, their executors and administrators,

with full liberty for them, or any of them, to take extracts or copies therefrom.

17. That all clerks, book-keepers, managers, and superintendents to be employed in and about the said joint concern shall, from time to time, be appointed and removed by both or all the said partners, or the majority in value of them.

18. That on the 31st day of December now next ensuing, and every succeeding 31st day of December in every year, during the continuance of the said partnership, a general account and rest in writing shall be made and taken by the said partners of all such coals, coke, ironstone, and other matters as shall have been sold in the said trade or business, and of all stock, moneys, debts, and other things belonging, due, or owing to the said partnership, and of all such debts as shall be due or owing from or by the said partnership to any person or persons by reason of the said trade or business, and of all such other matters and things as are usually comprehended in annual accounts of the same nature, taken by coal-dealers and coal-miners, and ironstone workers, or necessary and proper in relation to the business and copartnership carried on by virtue of these presents, and a just value and appraisement shall be made by the said parties of all the particulars included in such account which are capable of being appraised, and the said general account or rest, valuation or appraisement shall, from time to time, be written in a book, which shall be kept at the counting-house where the said trade or business shall from time to time be carried on, and if the said Sir Henry Hartley shall be a partner in the said business, then a copy of the said book shall be made and kept at Singleton Hall, for the use of the said Sir Henry Hartley and his said copartners, and each of the said partners shall, within two calendar months after the yearly taking of the said accounts, respectively sign the accounts contained in the said books, and shall be bound and concluded by every such account respectively, unless some manifest error shall be found therein, and signified by either or any of the said partners to the other or others of them, within one year from the date of such account, in which case, but not otherwise, such error shall be rectified. And on the making up of every such yearly account, all sums of money which the said partners, or any of them, may respectively have taken or received from the profits of the said concern, by virtue of the clause hereinbefore for that purpose contained (see *ante*, Article 10), together with interest on the said sums respectively, at 4*l.* per cent, shall be charged against each partner

or partners; and the clear profits of the said trade, after such and all necessary deductions and allowances made thereout, shall be divided between the said partners according to their respective proportions of the capital of the said partnership; and any partner who shall have received on account any more than such his ascertained share shall forthwith, within one calendar month after such yearly settlement of accounts, repay to the said banking account of the said partnership such excess of his receipts, with interest on the same in the meantime at the rate of 5*l.* per cent.

19. That within the space of six calendar months after the expiration or sooner determination of the said term of forty-two years, a just and true valuation shall be made and taken by the arbitrators hereinafter appointed, of all and singular the coals, coke, ironstone, bricks, brick-earth, machinery, horses, cattle, goods, stock in trade, chattels, and effects, then belonging to the said copartnership; and upon such valuation being taken, the said Sir Henry Hartley, his heirs or assigns, shall, according to the provision contained in the said indenture of demise, have the option of purchasing all or any such of the articles so valued, as shall consist of machinery or other articles and stock in trade, materials and effects used in and upon the said collieries or ironworks, or in carrying on the said trade, so as he or they shall give such notice in writing as is mentioned in the said indenture of demise of his or their desire to purchase the same; and immediately after such valuation shall be made or taken as aforesaid, all and singular the said coals, machinery, and other effects hereinbefore enumerated, shall be sold and delivered to the said Sir Henry Hartley, his executors and administrators, if he or they have elected to be the purchasers thereof; and if not, then the same shall be either by private sale or public auction, as the partners may determine, sold, and at the same time a general account in writing shall be taken of all the stock in trade, moneys, credits, and effects of the said copartnership, including a particular account of the moneys to arise from the articles so sold as aforesaid; and also of all debts due or owing by the said partners to any person or persons for any matter or thing concerning the said joint trade or business, or relating thereto; and upon finishing the last-mentioned account, the partner who shall have advanced or lent any sum of money more than the other or others to the said copartnership, shall be paid and satisfied such sum of money (if the same shall be then due), and all interest which may be due and owing to him from the copartnership or joint business in respect thereof, and

all other debts which shall be due or owing from or by the said copartnership and joint trade, shall also be satisfied and discharged; and then the residue of the effects, together with the debts and moneys due to the said partnership, shall be parted and divided between the said partners in proportion to their respective shares and interests therein. And each of the said partners shall give unto the other or others of them a bond, in a sufficient penalty, for the payment of his proportion of any debts owing by the said partnership; and well and effectually assign to and empower the other of them, his executors and administrators, to recover and receive all such credits and sums of money as shall be due and owing to him after such partition and division; and do and execute all such other acts and things as shall be necessary, in order to vest the sole right and property therein in the partner to whom the same shall then belong.

20. That in case either of the said partners, or any other person who, by virtue of these presents, shall be a partner in the said joint concern, shall during the said terms be desirous of selling his share of and in the said collieries and premises, then the continuing partner or partners shall have the option of purchasing such share in preference to any other person, at or for such price as shall be mutually agreed upon, or in case the said parties shall not agree as to such price, then, at a valuation to be made as hereinafter provided; and if such option is not accepted, then a sale of the said share shall take place to any other person in manner hereinafter in that behalf provided.

21. That in case either of the said partners, or any other person who shall be a partner by virtue of these presents, shall die during the continuance of this partnership, then the executor or administrator, or executors or administrators of the partner so dying, or one of his legatees, under the circumstances provided for by the next article, shall have the option of succeeding to the share or shares of such deceased partner in the said partnership business, estate and effects, if he or they shall think proper, and shall give notice of such his, her, or their intention, within twelve calendar months after the decease of such partner, to the surviving partner or partners; and thereupon, immediately after such notice, the executor or administrator, or executors or administrators, or legatee, under such circumstances as aforesaid, of such deceased partner, shall execute all such acts and deeds as shall be requisite to subject him, her, or them respectively to the same debts and demands, and to the same condi-

tions and agreements as the party so dying was subject or liable to in respect or by reason of the said partnership; and thereupon shall have full power and authority to share as a partner or partners in the conduct, management, profits, and privileges, and shall be liable to share the losses of the said partnership concern, in proportion to the value of the share or shares so accruing to him, her, or them respectively.

22. That if any partner shall die, having by his will devised or bequeathed all his share and interest in the said partnership to any person or persons, whether in trust or beneficially, other than his executors and administrators, and such executors and administrators shall not have within the time limited by the last article elected to become partners and duly accepted the partnership, but shall within such period, having duly taken administration of the said will, execute a proper transfer, assignment and release to any one, but not more, of such legatees of all such partnership share and interest of such testator, and signify the same to the surviving partner or partners, and such legatee shall, in proof thereof, produce the said assignment to the said surviving partners duly perfected, and request within such period to be admitted as partner, then such legatee shall, within such period, but not afterward, be entitled to be admitted in the same manner and subject to the same terms and conditions as if he were claiming to be admitted as the executor or administrator of such testator.

23. That in case either of the said partners, or any other person who shall be a partner by virtue of these presents, shall be desirous to sell his entire share (but not any part thereof), as aforesaid, and shall not agree with the continuing partner or partners, as to the price thereof, within six months after giving them notice of his intention to sell, or in case either of the said partners, or any other person, as aforesaid, shall die during the continuance of the said partnership, and his executors, or administrators, or legatee as aforesaid, shall decline or neglect to avail themselves of the option given to them by the articles hereinbefore contained, then the continuing or surviving partner or partners shall, within the space of six calendar months next thereafter, settle and adjust with the retiring partner, or the representatives of the deceased partners, all accounts, matters, and things relating to the said partnership, and the amount of the share of the retiring or deceased partner in the credits and effects of the said partnership, shall, in case the parties disagree respecting the same, be ascertained by an estimate and valuation to be made by arbitrators to

be chosen as hereinafter mentioned; and thereupon the continuing or surviving partner or partners, if he or they shall think proper, and shall declare their intention in writing to that effect within three calendar months after the award shall have been made by the said arbitrators in that behalf, and if no such intention be declared within such period, then any other person (but not more than one) may become the purchaser of the said share at the price or value to be ascertained as aforesaid, or at any price or value that can be gotten for the same; and such person shall enter into a bond in a sufficient penalty for indemnifying the estate and effects of the retiring or deceased partner against all debts and demands due or owing by or from the said partnership on having a proper assignment or assurance, or assignments or assurances, executed for vesting in the continuing or surviving partner or partners, together with the new partner, if any such there be, and enabling such continuing or surviving partner or partners, and new partner (if any), to collect and get in all credits and effects due, owing, and belonging to the said partnership.

24. That upon the admission of the said Sir Henry Hartley or any other person or persons, whether by assignment or succession into the said copartnership in manner hereinbefore mentioned, all and every the clauses, covenants, matters and things hereinbefore contained, shall be applicable as far as circumstances will permit, to the party or parties who shall so be admitted into partnership, and he or they shall, immediately on entering into the said partnership, sign and execute any such deed or deeds of conformity to these presents, as by the legal advisers of the continuing or surviving partner or partners shall be reasonably required.

25. That in all matters and things relating to the said copartnership, except otherwise provided for by these presents, the voice and determination of the major part in value of the partners for the time being, shall be conclusively binding on the other or others of the said partners unless the other or others of them shall be desirous of submitting the matters and things in question to the determination of arbitrators, to be chosen as hereinafter mentioned.

26. That in case the said Sir Henry Hartley shall be interested in having an account and valuation taken and made of moneys to be repaid to him at the expiration of five years as hereinbefore mentioned and provided for, and shall demand an arbitration in respect of such account or valuation, he shall be entitled to such arbitration; and thereupon one arbitrator shall be chosen by the said Sir Henry Hart-

ley, and the other by the said John Cole and John Church, or the majority in value of the partners for the time being, and such arbitrators shall choose a third arbitrator, and the three arbitrators so chosen shall have the same powers and authorities (allowing for difference of circumstances) as are next hereinafter provided for, in regard to arbitration between persons who shall be partners by virtue of these presents.

27. That as well for settling and adjusting the several matters and things hereinbefore made the subject of arbitration, as for settling and adjusting any differences or controversies which may arise either during the continuance of the said partnership, or after the expiration thereof, between the said John Cole, John Church, and Sir Henry Hartley, or any of them, their or any of their executors, administrators or assigns, or any persons who, by virtue of these presents, shall become partners in the said mines and collieries, touching the dealings and transactions, profits or losses of the said partnership, or the taking the accounts thereof, or touching any valuation to be made, or any sum or sums of money to be paid by virtue of these presents, or the admission of any person or persons into the said partnership, or touching the construction of any covenant, article, proviso, or clause hereinbefore contained, or any other matter or thing relating to the said partnership, then such differences and controversies (in case the said parties cannot determine the same by agreement between or among themselves), and also all other matters and things hereinbefore made the subject of arbitration, shall, from time to time, and as often as occasion shall require, be referred to the arbitration of three indifferent persons to be appointed as arbitrators in manner following (that is to say), in case there shall be two parties only who shall be partners in the said partnership, then one arbitrator shall be appointed by one of such parties, and the other arbitrator by the other of such parties, and the arbitrators so appointed shall forthwith, before they proceed to the business of the said arbitration, choose a third person to act with them as arbitrator, and in case they shall differ as to the choice of such third person, then such third person shall be chosen by lot out of two other persons to be named by the said partners; and in case there shall be three parties who shall be parties in the said partnership, then one arbitrator shall be appointed by each of such parties; and for the purposes of such arbitration, the executors, administrators and assigns of a deceased partner shall be considered as one party only, and in case any or either of the said partners, or

their executors, administrators or assigns shall, upon being requested, refuse or neglect forthwith to appoint an arbitrator, then the other partners or partner, or their executors or administrators, shall appoint another arbitrator, and the arbitrators so appointed (if only two in number) shall choose a third person to act with them as arbitrator; and in case any partner shall die after any matter shall have been agreed to be referred to arbitration, but before any arbitrator shall have been chosen by him as aforesaid, then the executors or administrators of the partner so dying shall have the same power of choosing an arbitrator as the partner represented by him would have had by virtue of these presents. And it is hereby agreed that the arbitrators so appointed as aforesaid, or any two of them, shall award, adjudge, and determine concerning such differences and controversies; and each of the said partners shall and will stand to, obey, fulfill, perform, and keep the award and determination of such arbitrators or any two of them, and pay such costs as they shall award and direct, so as such award of and concerning the premises be made in writing under the hands and seals of such arbitrators, or any two of them, ready to be delivered to the said parties hereto, their executors, administrators, or assigns, within thirty days next after the time fixed by the said arbitrators for making their award therein; and for the better enforcing the performance and observance of every such award, the same shall from time to time be made a rule of the Court of Queen's Bench, according to the direction of the statute, in that case made and provided.

28. Provided, always, and these presents are upon this express condition, that if any person who, by virtue of these presents, shall be a partner in the said joint concern, shall refuse to keep proper accounts, or shall give cheques not authorized as hereinbefore mentioned, or shall employ the moneys of the said partnership for other than partnership purposes without such consent as aforesaid, or shall, without the like consent, draw, accept, indorse, or negotiate any bill of exchange or promissory note, or any other security in the name or names of his copartners, so as to make him or them liable for payment of any sum or sums of money not in the ordinary course of the said partnership business, or shall do or suffer any act or thing whereby the said joint concern shall be incumbered, prejudiced, or affected, or shall, except with such consent as aforesaid, embark in any other coal partnership which shall use the ——— railway for the conveyance of their coals, or shall sell, or in any manner attempt to

sell, his share or shares in the said joint concern without giving the continuing partner or partners an option to purchase the same as aforesaid, or shall become bankrupt, insolvent, or outlawed, or suffer his body to be taken in execution for more than one calendar month, or shall do, permit, or suffer any act, deed, matter, or thing whatsoever, whereby the said partnership moneys or effects may be seized, attached, or taken in execution, then and in every of such cases the other partner or partners shall be at liberty to dissolve the said partnership as to the partner so offending, by serving the said offending partner personally with, or leaving at his usual place of abode, or, if that is unknown, then his last place of abode, or with any person acting as his attorney or agent, a writing signed by such other partner or partners, or the majority of them in value, declaring the partnership to be dissolved, in manner and to the extent aforesaid; and thereupon the share or shares of the said offending partner shall be valued and sold, and the said other partner or partners shall have the option of purchasing the same, in the same manner as hereinbefore is provided for in the case of a partner desiring to sell his share or shares of and in the said copartnership collieries and premises. And it is hereby agreed that this article shall be without prejudice to any other remedies which may be had against the said offending partner by the said other partner or partners for breach of any of the covenants hereinbefore contained. In witness, etc.

No IX.

Assignment of a Deceased Partner's Stock, by his Executors, to the surviving Partners.

This indenture, made the day of , 1832, between M, of, etc., and N, of, etc., of the one part; and A & B, of, etc., of the other part: Whereas, by an indenture bearing date, etc., and made between the said A of the first part, the said B of the second part, and C, therein described, of the third part, the said several parties thereto agreed to become partners in the trade of , for the term of years: And whereas, in pursuance of the said indenture, the said A, B and C for some years carried on the business of , in partnership, at : And whereas the said C duly made and published his last will and testament in writing, bearing date, etc., and he thereby

appointed the said M and N executors thereof: And whereas the said C died on the day of, etc., and soon after his decease the said M and N duly proved his said will in the Court of : And whereas, in pursuance of a power or direction for that purpose contained in the said recited indenture, the accounts of the said partnership have been duly settled and stated up to the day of the death of the said C, and after a just valuation taken of all the stock in trade and fixtures of the said partnership, and also of the credits and ready money thereof, and after payment of the debts of the said partnership, the share of the said C in the clear surplus of the capital stock of the said partnership hath been found to amount in value to the sum of £ : And whereas the said M & N, as executors of the said C, have agreed to accept the said sum of £ , in full of all further claims or demands of them, the said executors, upon or out of the said partnership stock: Now, this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the sum of £ of lawful English money to them, the said M & N, or one of them, in hand well and truly paid by them, the said A & B, immediately before the sealing and delivery of these presents, the receipt of which said sum of £ they, the said M & N, do, and each of them doth, hereby acknowledge, and of and from the same and every part thereof do, and each of them doth, acquit, release, and discharge, as well them, the said A & B, their executors and administrators respectively, as also the said joint stock of the said late copartnership, forever by these presents; they, the said M & N, have, and each of them hath, bargained, sold, assigned, transferred, and set over, and by these presents do, and each of them doth, bargain, sell, assign, transfer, and set over unto the said A & B, their executors, administrators, and assigns, all and every the part and parts, share or shares whatsoever, late of him, the said C, of and in all and every the stock, goods, moneys, credits, effects, and things of the said partnership, and all other the right, title, and interest whatsoever belonging or accruing to the estate late of him the said C, by virtue of his being a copartner with them the said A and B as aforesaid; and all the right, interest, property, benefit, advantage, claim, and demand whatsoever, both at law and in equity, of them the said M and N, or either of them, of, in, to, or out of the said stock and primises hereby assigned or intended so to be, and every part and parcel thereof; to have, hold, receive, take, and enjoy the said premises unto the said A and B, their executors, administrators, and

assigns. And for the better and more effectually enabling them the said A and B to have and receive all and singular the said hereby assigned premises to and for their own use and benefit, they, the said M and N, have, and each of them hath, and by these presents do, and each of them doth, make, constitute, and appoint them, the said A and B, their executors, administrators, and assigns, the true and lawful attorney or attorneys, jointly and separately, irrevocable, of them the said M and N, to ask, demand, sue for, recover and receive to and for their own proper use and benefit, all and singular the said hereby assigned goods, moneys, stock, credits, effects, and premises, of and from all and every person and persons whomsoever, who are or shall be liable to answer and pay the same; and, in case of non-payment thereof, or of any part thereof, then at the charge of them, the said A and B, and in their own names, and in the names of them, the said M and N, or either of them, to bring any action or suit, either at law or equity, for the recovery thereof, and the same to prosecute to effect, and, upon receipt thereof, or of any part thereof, to give proper and sufficient discharges for the same, and finally to make, do, and execute all and every such further and other lawful acts, deeds, and things in the premises, as fully and effectually as the said M and N might or could do if personally present; provided always, that they, the said A and B, their executors, administrators, and assigns, shall and do at all times hereafter save harmless and keep indemnified them the said M and N, their executors and administrators, of, from, and against all costs, charges and damages, which they, or either or any of them, shall or may pay or sustain by reason of their, either or any of their names being made use of in any action or suit to be brought or commenced by virtue of the power hereby given. And they, the said M and N, for themselves, their executors and administrators, do hereby covenant, promise, and agree with and to the said A and B, their executors, administrators, and assigns, that they, the said M and N, have not nor hath either of them made, done, committed, or suffered any act, matter, or thing whatsoever, whereby or by means whereof the said hereby assigned premises, or any part thereof, are, is, shall, or may be in anywise prejudiced, released, discharged, or incumbered; nor shall or will at any time hereafter do any act or thing whatsoever whereby to release or discharge all or any the said hereby assigned premises, or any part thereof, or the power or authority hereby given for recovering the same, or any action or suit to be thereon brought for recovering

thereof, without the consent of them the said A and B, their executors, administrators, or assigns, first had in writing for that purpose; and also that they, the said M and N, and all other persons lawfully claiming any right or interest of, in, or to the said hereby assigned premises, or any part thereof, by, from, or under them, or either of them, or by, from, or under the said C, shall and will at any time, at the request and at the proper costs of the said A and B, or either of them, their or either of their executors or administrators, make, do, and execute all such further or other lawful and reasonable acts, for the further, better, and more perfectly assigning all and singular the said hereby assigned premises, unto them, the said A and B, their executors, administrators, and assigns, as by them or any of them, or their or any of their counsel in the law, shall be reasonably advised or required; And further, that in case, within the space of months now next ensuing, it shall be proved, or made plainly appear, that he, the said C, hath contracted any debt or debts on account of his said late copartnership with them, the said A and B, with any person or persons whomsoever, and that such debt or debts is or are now justly due and owing from the said C to such person or persons on account of the late joint trade, and the same shall become charged therewith; then and in such case, they, the said M and N, their executors and administrators, shall and will, out of the estate of the said C, pay and satisfy all and every such debt or debts so now due as aforesaid, or shall and will save harmless and keep indemnified them, the said A and B, their executors and administrators, of and from payment thereof. And this indenture further witnesseth, that, for the considerations and in pursuance of the agreement aforesaid, they, the said M and N, do hereby for themselves, and for their respective executors and administrators, and for all other the representatives of the said C, remise, release, and forever quitclaim unto them, the said A and B, their executors and administrators, all and every sums and sum of money now due to the said late joint trade, and all and all manner of actions, suits, claims, and demands whatsoever, both at law and in equity, which they, either, or any of them, can or may from henceforth claim, challenge, or demand against them, the said A and B, or either of them, their or either of their executors or administrators, for or on account of any breach or non-performance of any covenant or agreement, or any other act, matter, or thing whatsoever done or committed, or which on their part, by virtue of the said indenture of copartnership, or otherwise, are or were by them covenanted or

agreed to be paid, done, and performed; and they, the said A and B, in consideration of the release hereinbefore made and given to them as aforesaid, and also in pursuance of the said agreement, do hereby for themselves, and for their respective executors and administrators, remise, release, and forever quitclaim, unto them, the said M and N, and all and every other the representatives of the said C, all and every sum and sums of money, and all and all manner of actions, suits, claims, and demands whatsoever, both at law and in equity, which they, either or any of them can or may have, claim, challenge, or demand against the estate late of the said C, or them, the said M and N, as executors thereof, for or on account of any breach or covenant, or non-performance of any agreement, or any other act, matter, or thing whatsoever by him or them done or committed touching or relating to the before-mentioned copartnership, or which, by the said indentures of copartnership, or otherwise, are or were by him, the said C, thereby covenanted or agreed to be paid, done, and performed, save and except such particular debt or debts hereinbefore specially referred to, as may under certain contingencies, and within the space of months, become payable by the said M and N, on the conditions and in manner aforesaid. In witness, etc.

No. X.

Deed of Partnership between two Persons.

(*General form.*)

This indenture, made the —— day of ——, between A B, of, etc., of the one part, and C D, of, etc., of the other part, Witnesseth, that in consideration of the mutual trust and confidence which the said A B and C D have in each other, each of them, the said A B and C D, doth for himself, his heirs, executors, and administrators, covenant with the other of them, his executors and administrators, by these presents in manner following, that is to say:

1. That they, the said A B and C D, will be partners in the business of —— from the —— day of ——,[1] for the term of fourteen years thence ensuing.

2. That if, nevertheless, either of the said partners shall be desirous to determine and dissolve the said partnership at the end of seven

[1] Or if so intended, "from the day of the date of these presents."

years from the said —— day of ——,[1] and of such his desire shall give not less than six calendar months' previous notice in writing to the other of them, or shall leave such notice at the place where the said business shall for the time being be carried on, then and in such case the said partnership shall cease and determine upon the expiration of the said seven years.

3. That if either of the said partners shall be guilty of any breach or non-observance of any of the stipulations contained in the twelfth, fourteenth, fifteenth, and seventeenth articles hereinafter mentioned, the other of the said partners shall be at liberty, if he shall think fit, within three calendar months after the same shall become known to him, to dissolve the said partnership by giving to the partner who shall so offend, or leaving in the counting-house or other place where he shall usually carry on business, notice in writing declaring the said partnership to be dissolved and determined, and the said partnership shall, from the time of giving or leaving such notice, or from any other time to be therein appointed for the purpose, absolutely cease and determine accordingly, without prejudice, nevertheless, to the remedies of the respective partners, for the breach or non-observance of all or any of the covenants and agreements contained in these presents at any time or times before the determination of the said partnership. And the partner to whom the said notice shall be given shall be considered as quitting the business for the benefit of the partner who shall give the said notice.

4. That the firm and style of the said partnership shall be ——.

5. That the business of the said partnership shall be carried on

[1] If it is intended that there should be power of dissolution upon notice at the will of either party for the clause in the text substitute the following:

"That if nevertheless either of the said partners shall be desirous to determine and dissolve the said partnership at any time before the expiration of the said term of fourteen years, and of such his desire shall give not less than six calendar months' previous notice in writing to the other of them, or shall leave such notice at the place where the said business shall for the time be carried on, then and in such case the said partnership shall cease and determine immediately upon the expiration of the said six calendar months, or at such future day or time as shall be named in the said notice."

As lunacy does not *per se* work a dissolution, this clause would in a certain degree provide for the case of a partner turning lunatic by enabling the other partner to dissolve, but as six months' notice would be necessary under this clause, a special clause for this purpose may be inserted, at least where there are several partners. A doubt may have formerly existed whether a notice to dissolve being served on a lunatic was valid, but this doubt has been set at rest by the very recent case of Robertson v. Lockie, 10 Jur. 533, in which the Vice-Chancellor of England, Sir L. Shadwell, held that, where partners agreed that their partnership should be dissolved on notice, the notice was good, though the partner on whom it was served was lunatic at the time.

at ——, or at such other place or places as the said partners shall hereafter determine.

6. That the capital of the said partnership shall consist of the sum of £ to be brought into the said business by the said A B and C D, in equal proportions, and the said capital and the profits arising therefrom (including the premiums to be paid for any apprentice to be taken by either of the said partners) shall (subject as is hereinafter mentioned) be employed in the said business, and the said A B and C D shall be entitled to and interested in the said capital and so much of the gains, profits, and produce thereof as shall remain after all payments hereinafter directed to be made thereout shall have been made, in equal proportions.

7. That the rent of all houses or buildings where the business of the said partnership shall be carried on and the costs of all repairs and alterations, and all taxes, rates, assessments, payments for insurance, and other outgoings whatsoever in respect of the same, and the salaries, wages, or maintenance of all persons employed in the said business, and all other moneys which shall become payable on account of the said business, and all losses and damage which shall happen in the same, shall be paid, defrayed, and borne by and out of the capital of the said partnership and the gains and profits arising from the same; or in case the same shall become deficient, then by the said A B and C D, out of their respective separate estates in equal shares.[1]

[1] When the capital is not advanced in equal proportions, but, for example, in the proportion of two-thirds by A, and one-third by B, for the clause in the text substitute the following:

"That the capital of the said partnership shall consist of the sum of £ to be brought into the said business by the said A B and C D in the following proportions, namely, two-thirds by the said A B and the remaining one-third part thereof by the said C D, and the said partners shall be entitled to and interested in the said capital and so much of the profits or produce thereof as shall remain after all payments hereinafter directed to be made thereout shall have been made in the following proportions, namely, the said A B in two-third parts, and the said C D in the remaining one-third part thereof." It frequently happens that the stock in trade, etc., is purchased of one of the partners. In such case substitute the following clause: "That the capital of the said partnership shall consist of the sum of £ to be advanced and brought into the said business by the said A B and C D in the following proportions, namely, two-thirds by the said A B, and the remaining one-third part thereof by the said C D, out of which sum of £ , the sum of £ shall be forthwith paid to the said A B, as and for the price or purchase-money of the stock in trade and fixtures heretofore used by him in his said trade or business of a ——, and which stock in trade and fixtures have been purchased by the said partnership at the price aforesaid, and the said partners shall be entitled to and interested in the said capital and the profits thereof, stock in trade and fixtures, in the proportions aforesaid."

[2] Sometimes the house in which the business is carried on is the private property of one of the partners, and rent is then paid to such partner for his house. In this case, insert the following clause:—"That the said A B, (or C D as the case may be), shall be allowed by the said partnership, the clear yearly sum of £ by way of rent for the said messuage in street aforesaid,

8. That the said A B shall be at liberty from time to time to draw out of the moneys of the said partnership any sum or sums not exceeding the sum of £ per month for his own separate use. And the said C D shall also be at liberty to draw out of the said moneys any sum or sums not exceeding the sum of £ per month for his own separate use; but in case at the end of any year it shall appear upon taking the general annual account that the net profits of such year shall not have amounted to the sum of £ (the total amount drawn out by both parties during the year), then and in such case immediately after such general annual account shall have been taken, each of them, the said A B and C D, shall pay to the said partnership the excess (if any) of the amount of the sums which he shall actually have received over the sum which he shall have been entitled to receive as his share of the net profits of the said business during such year.

9. That each of them, the said A B and C D, will diligently employ himself in the business of the said partnership, and be faithful to the other in all transactions relating to the said partnership, and give a true account of the same, and all letters and things which may come to his hands or knowledge concerning the said partnership to the other as the same shall be required.

10. That neither of them, the said A B and C D, will either by himself, or with any other person or persons whomsoever, either directly or indirectly engage in the business of [the business of this partnership,] or in any business except the business of the said partnership and upon account thereof,[2] and that neither of them will, without the consent in writing of the other, employ any of the moneys or effects of the said partnership, or engage the credit thereof except upon the account and for the benefit of the said partnership.

---

so long as the said business shall be carried on therein, but that the said messuage shall continue the sole property of the said A B (or C D) subject only to be used for the purpose of the said partnership business." And if so intended, "That the said A B (or C D) shall be at liberty if he shall think proper to use and occupy all such part of the said messuage as is not used in or wanted for the purposes of the said partnership business for the residence of himself and his family without paying any rent or taxes for the same." Or if so intended, "At the yearly rent of £ to be paid by him the said partnership in equal half-yearly portions or proportionally for any less period during the time of such occupation, but the said A B (or C D) shall not be required to pay any proportion of the taxes in respect of his said occupation, and shall be at liberty to quit and leave the said premises if he shall think proper, without any previous notice."

[1] With respect to this and some of the subsequent clauses, the remark of Mr. Jarman, already cited, may be repeated, that "provisions which are almost of course cannot be too short."

[2] This covenant is frequently made to prohibit only the business of the partnership.

11. That neither of them, the said A B and C D, will take any apprentice, or hire or dismiss any clerk, traveler, workman, or servant in the business of the said partnership, without the consent of the other of them.[1]

12. That in all cases where there shall be occasion to give any bond, note, bill, or other security for the payment of any sum or sums of money on account of the said partnership (except where the contrary shall in the common course of business be unavoidable), the same shall be respectively signed and executed by both of them, the said A B and C D, and that if either of them shall give any such security (except in the cases before mentioned) which shall not be executed and signed by the other of them, the same shall be deemed to be given on the separate account of the partner so giving it, and he shall satisfy the same out of his separate estate, and shall indemnify the other of them from all expenses on account thereof.

13. That if either of them, the said A B and C D, shall at any time during the continuance of the said partnership lend any of the moneys, or deliver upon credit any of the goods belonging to the said partnership, to any person or persons whom the other of them shall previously by notice in writing have forbidden him to trust; or shall borrow or take up any money whatsoever on account of the said partnership, or compound any debt or debts which shall be due to the said partnership, without the consent in writing of the other, then and in such case the partner so lending or delivering upon credit such money or goods shall pay to the said partnership so much ready money as the full amount or value of the money or goods which he shall so lend or deliver upon credit as aforesaid; and the partner so borrowing money on account of the said partnership shall make good unto the said partnership the whole of the money so borrowed; and the partner so compounding debts shall make good unto the said partnership the whole of such moneys and debts as he, or any other person by his order or authority, shall give any receipt for.

14. That if either of them, the said A B and C D, shall at any one time buy, order, or contract for any goods or articles exceeding the value of £ , without the previous consent in writing of the other, in such case the other shall have the option either to take such goods or articles on account of the said partnership or to let the same

[1] If so intended add: — "And that any premium or sum of money received in respect of any apprentice shall be considered part of the profits of the business of the said partnership," in which case it might be convenient to place this clause after the clauses respecting the capital or profits of the business. See Precedent 3.

remain the separate property of the partner who shall have so bought, ordered, or contracted for the same.

15. That neither of them, the said A B and C D, will without the previous consent in writing of the other enter into any bond or become bail or security with or for any person or persons,[1] or subscribe any policy of insurance, or do or willingly suffer to be done any act, matter, or thing whereby the capital or property of the said partnership may be seized, attached, extended, or taken in execution.

16. That each of them, the said A B and C D, will punctually pay and discharge his separate debts, and indemnify the other of them and the capital and property of the said partnership against the same and all expenses on account thereof.

17. That books of account shall be kept by the said partners and proper entries made therein of all the moneys, goods, effects, debts, sales, purchases, receipts, payments, and all other transactions of the said partnership, and that the said books of account, together with all bonds, notes, bills, specialties, assurances, securities, letters and other writings belonging to the said partnership, shall be kept at the counting-house in , aforesaid, or in such other place where the business of the said partnership shall be carried on, and each of the said partners shall have free access at all times to examine and copy out the same.

18. That, on the day of , in the year , and on the day of , in every succeeding year during the continuance of the said partnership, a full and particular account and rest in writing shall be made and taken by the said partners of all the stock in trade, moneys, credits and things belonging, due or owing to the said partnership, and of all debts due or owing from the same, and of all such other matters and things as are usually comprehended in annual accounts of the like nature taken by persons engaged in the business of a , and that a just valuation or appraisement shall be made of all the particulars included in such account which require and are capable of valuation or appraisement, and that the said annual account or rest and valuation or appraisement, or a sufficient abstract thereof, referring to the particulars in the ordinary books of this partnership, shall be entered in two books and be signed in each such book by each of them, the said A B and C D, within three calendar months after the time appointed for taking thereof respectively, and that, after

[1] "This prohibition is often found useful in affording partners a reason for refusing to become bail or surety." 7 Jarm. Conv. 127, n. d, 3d ed.

such signature, each of the said partners shall take one of the said books into his custody and shall be bound and concluded by every such account respectively, unless some manifest error shall be discovered therein within twelve calendar months then next, and be signified by either of the said partners to the other of them, and then and in such case such error shall be rectified.

19. That, within the space of six calendar months after the expiration or determination of the said partnership, a full, true and particular account, in writing, shall be made and taken by the said A B and C D of all the stock in trade, moneys, credits, effects and things then belonging to the said partnership, and of all moneys and debts due or owing by the said partnership, and of all the liabilities of the said partnership, and a just valuation or appraisement shall be made of all the particulars included in such account which require and are capable of valuation or appraisement, and, immediately after such last-mentioned account shall have been so taken and settled, the said partners shall pay or make due provision for the payment of the debts owing by the said partnership and for meeting all the liabilities thereof, and the balance of the said stock in trade, moneys, credits, effects and things then belonging to the said partnership shall be divided between the said A B and C D in equal shares,[1] and such instruments in writing shall be executed by the said A B and C D respectively for getting in the outstanding credits and effects of the said partnership, and for indemnifying each other concerning the premises and for vesting the sole property in the said respective shares of and in the said stock in trade and effects in each of the said partners to whom respectively the same shall, upon such division, belong, and for releasing to each other all claims on account of the said partnership, as are usual in cases of the like nature, such instruments respectively to be at the expense of the person requiring the same, and, if any question shall arise as to the propriety of any instrument or of any clause or provision therein required by either party, such question shall be referred to the senior counsel practicing in the court of chancery who will consent to give an opinion therein.

20. That, in case either of the said partners shall die during the said partnership, his executors and administrators shall, if such death shall happen before the day hereinbefore appointed for the first general annual account, be entitled to the capital brought in by such deceased

[1] If the shares are not equal, substitute "in the proportions hereinbefore mentioned."

partner, or, if the same shall happen after the day hereinbefore appointed for the first annual account, shall be entitled to such sum of money as the share of the deceased partner of and in the stock of trade, moneys, credits and effects of the said partnership shall, upon the then last general annual account, amount to, or as such share would have amounted to in case such account had been taken on the day of [*the proper day for taking such account*], immediately preceding such death. And, in either case, the executors or administrators of the said deceased partner shall also be entitled to an allowance after the rate of £ per cent per annum upon the capital or share of stock in trade, moneys and effects (as the case may be) of such deaceased partner in lieu of profits from the commencement of the said partnership or from the then last general annual account (as the case may be) to the time of such death, and the surviving partner, his executors or administrators, shall pay such allowance in lieu of profits, on demand, and shall, within next after the death of the deceased partner, execute and deliver to his executors or administrators a bond in a penalty double the principal, conditioned for the payment of the said principal sum to which they shall become entitled, as aforesaid, with interest at the rate of £ per cent per annum, from such death in manner following, (that is to say) one-third part of such principal sum, with the interest on the same third part, at the end of six calendar months from the date of such bond, one-third part, with interest thereon, at the end of twelve calendar months from the date of such bond, and the remaining third part, with interest thereon, at the end of eighteen calendar months from the date of such bond.

21. That the surviving partner, his executors or administrators, shall also execute and deliver a bond in a sufficient penalty to the executors or administrators of the deceased partner for indemnifying them and the estate of the deceased partner from the debts, engagements and liabilities of the said partnership at or after such decease, and from all expenses on account of the same, and the executors or administrators of the deceased partner shall release and assign unto the surviving partner, his executors and administrators, all their share, rights, title and interest of, in and to the stock in trade, moneys, credits and effects of the said partnership, and empower and enable him and them as much as in them lies to recover and receive the same [1] In Witness, etc.

[1] Clauses for referring disputes between partners to arbitration have been usually been inserted in partnership deeds, but they are hardly ever acted upon, and there appear to be grounds for believing that they are something less than useless.

No. XI.

Deed of Partnership in the business of Coachmakers with provisions for one of the partners (a minor) subjecting himself to the articles when of age.

This indenture, made, etc., between A B, of, etc., of the one part, and C D, of, etc., and C D, his son, of the other part. Whereas, the said A B hath, for some time past, carried on the trade or business of a coachmaker and coach-harness-maker in and upon a certain messuage, tenement, manufactory and buildings in, etc., aforesaid held upon lease for the term of twenty-one years, commencing at under and also upon other premises in, etc., aforesaid, of which he is tenant at will. And whereas, the said A B hath agreed with the said C D the father to admit the said C D the son as a partner with him in his said business, and to an equal fourth part or share of the capital, stock in trade, and other effects at present employed in the said business, and of the gains and profits to be derived therefrom upon the conditions hereinafter expressed. And whereas, the said capital or stock in trade and effects employed in the said business, including the several coaches and carriages now let out on hire to divers persons, and also including the lease of the premises in which the said business is carried on, have been estimated and are agreed to be valued at the sum of £ , one-fourth part whereof the said C D the father hath accordingly agreed to pay the said A B on behalf of the said C D the son, at the times hereinafter expressed (that is to say), £ part thereof upon the execution of these presents, and the further sum of £ the residue of such fourth part, upon the day of , now next ensuing. And whereas in regard that the said C D the son will not attain his age of twenty-one years until the day of in the year the said C D the father hath agreed in the meantime to become his guaranty or surety for the performance and fulfillment of the several covenants, stipulations, articles and agreements hereinafter contained, and on the part of the said C D the son to be performed. Now this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the premises and of the mutual trust and confidence which the said parties hereto repose in each other, and in consideration of the sum of £ , to the said A B paid by the said C D the father, upon or before the sealing and delivery of these presents, being one-half part of the purchase-money

agreed to be paid for the fourth part or share of the said C D the son, of and in the capital of the copartnership intended to be hereby established (the receipt of which said £ he, the said A B, doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and forever discharge the said C D the father and C D the son respectively and their respective executors, administrators, and assigns by these presents), and in consideration of the further sum of £ , being the residue of the said consideration money to be paid to the said A B by the said C D the father pursuant to his covenant hereinafter contained in that behalf, the said A B doth hereby for himself, his heirs, executors, and administrators, and as to and concerning his and their rights and interests, acts, deeds, and defaults, covenant, and agree with the said C D the son, his executors, administrators, and assigns, and the said C D the father for himself, his heirs, executors, administrators, and assigns, and for and on the behalf, and as to and concerning the rights and interests, acts, deeds, and defaults of the said C D the son, his executors, administrators, and assigns, and by and with the consent, privity and approbation of the said C D the son, testified by his executing these presents, doth covenant and agree with the said A B, his executors, administrators, and assigns, mutually and reciprocally by these presents in manner following (that is to say):

1. That they, the said A B and C D, the son, will be copartners in the trade or business of a coach-maker and coach-harness-maker, and all other things incident to or commonly connected with the said trade for the term of fourteen years, to commence and be computed from the day of in the year upon the terms and conditions and under and subject to the stipulations and regulations hereinafter contained.

2. That in case the said A B shall at any time during the continuance of the copartnership hereby established be desirous to retire from the said business and to dissolve the said copartnership, it shall be lawful for him so to do upon giving three calendar months' previous notice in writing to the said C D the son, or leaving the same at his last or most usual known place of abode, at the expiration of which notice the said copartnership shall accordingly cease, determine, and be dissolved; and that in such case the said C D the son shall have the option to purchase the share and interest of the said A B of and in the said copartnership effects upon the like terms in all respects, and upon giving the like security to the said A B as the said C D the

son could or might have done pursuant to the provision hereinafter contained in case the said A B had departed this life; and that in case the said C D the son shall decline to become the purchaser of such share upon those terms, the said copartnership concerns shall be wound up and settled, and the said joint effects shall be divided and disposed of in the same manner in all respects as if the said copartnership term of fourteen years had actually elapsed at the time of such dissolution of the said copartnership as last mentioned.

3. That if either of them, the said copartners, shall at any time during the continuance of this copartnership become bankrupt or insolvent, or shall do or knowingly suffer to be done any act, matter, or thing by means or in consequence whereof the said copartnership effects or any part thereof shall or may be seized, attached, extended, or taken in execution for or on account of his private debts or engagements, or shall in any other respect be guilty of a willful or notorious breach or infringement of all or any of the covenants, stipulations, and agreements herein contained which on his part are or ought to be performed; then and in every such case, although no advantage may have been taken of any previous default, it shall be lawful for the other of them at any time within three calendar months next after such offense or default to dissolve and determine this copartnership by giving notice in writing of his determination in that behalf to the copartner so offending or making default or leaving the same at his last or most usual known place of abode. And immediately after such notice, so given or left as aforesaid, the said copartnership shall be dissolved and determined to all intents and purposes, but without prejudice to any remedies for the breach or non-performance of any of the covenants or agreements in these presents contained. And the copartner so dissolving the said copartnership shall wind up or settle the accounts and concerns of the said copartnership, and at his option shall take the whole copartnership effects, accounting for and securing the share and interest (if any) of the copartner so making default, or otherwise the copartnership debts and effects shall be divided and allotted between them in the same manner in all respects as if the copartner so making default had departed this life, or as near thereto as circumstances will permit.

4. That upon the dissolution and determination of the copartnership hereby established, either by effluxion of time or in pursuance of any of the provisions hereinbefore contained in that behalf, public notice of such dissolution shall be given by advertisement in the Lon-

don Gazette, and by circular letters to be transmitted to the several creditors, customers, and correspondents of the said copartnership. And that all parties interested in such dissolution shall join and concur in procuring the insertion of such advertisement, and in transmitting such circular letters accordingly.

5. That the said trade or business shall be conducted and carried on, in, or upon the messuage, manufactory, buildings, and premises in now occupied for that purpose under the firm or style of .

6. That the capital of the said copartnership shall consist of the stock in trade and effects belonging to the said A B and employed by him in carrying on the said trade or business, including the lease of the said messuage and premises and all his term, right, and interest therein, and also all the coaches and carriages now let on job, all which stock and effects, coaches and carriages, and lease have been estimated at the amount or value of £ ; and that the said capital shall, during the said copartnership, continue and be of the amount or value of £ at the least, and the same, together with the increase thereof, shall be employed in carrying on the joint trade or business, and shall not, nor shall any part thereof, be withdrawn therefrom by either of the said copartners on any pretense whatsoever, except as hereinafter is mentioned. And that the said A B and C D, the son, shall at all times during the continuance of the said copartnership be interested in and entitled to the capital or joint stock in trade of the said copartnership, and so much of the gains, profits, and produce thereof as shall remain after all payments hereinafter directed to be made thereout shall have been made, in the shares and proportions following (that is to say), the said A B shall be entitled to three equal fourth shares or parts thereof, and the said C D, the son, shall be entitled to the remaining fourth part or share thereof, and that the said copartners shall contribute to and bear the losses and expenses incident to the said joint trade in the same proportions.

7. That if at any time during the continuance of the said copartnership either of the said copartners shall, with the consent of the other of them, advance to, or leave in the said joint trade any sum or sums of money over and above his share of capital, interest at the rate of five per cent per annum shall be allowed and may be drawn half yearly out of the profits of the said trade in respect of such sum or sums of money, but the principal sum or sums shall not be withdrawn without three calendar months' previous notice in writing.

8. That the ground rent of the messuage and premises in aforesaid, and the rent of any other buildings and premises which shall from time to time be occupied for the purposes of the said joint trade, and all premiums to be paid for renewal of the said lease or for the lease or leases of any other premises to be taken for the purposes of the said trade, and all repairs, additions, and alterations of, in, or to the same, and all taxes, rates, assessments, and impositions, parliamentary and parochial, payable in respect thereof, and also all the premiums and expenses of insuring the same and the stock of the said copartnership against accidents by fire, and also the wages of clerks and servants employed in the said copartnership trade, and all other necessary charges and expenses whatsoever incident to carrying on the same, and also all debts and duties which shall be contracted on account of the said trade or business, and all losses or damages which shall be incurred or sustained in the course of the trade by bad debts, decay of goods, or other misfortunes or casualties whatsoever, shall be defrayed, paid, and borne by and out of the profits and proceeds of the said joint business.

9. That the said A B shall continue to occupy the said dwelling-house in aforesaid, as a residence for himself and his family, without paying any rent in respect thereof, and that in consideration thereof he, the said A B, shall find and provide suitable board, lodging, and accommodation for the said C D, the son, and also for all apprentices now serving them, the said A B and C D, the son, in the said dwelling-house, without any other remuneration for the same. But in case any apprentices are afterward taken they are to be kept at the expense of the said copartnership.

10. That it shall be lawful for the said A B, and C D, the son, to draw out of the moneys of the said copartnership during the continuance thereof, for their respective private expenses, the several monthly sums hereinafter expressed (that is to say), the said A B the monthly sum of £ , and the said C D, the son, the monthly sum of £ , which several sums shall from time to time be charged to their respective private accounts as so much received on account of their respective shares of the profits of the said trade, but in case, at the end of any year, it shall appear upon taking the general annual account that the net profits of such year shall not have amounted to the sum of £ [the total amount drawn out by both partners during the year], in such case, immediately after such general annual account shall have been taken, each of them, the said A B and C D,

shall repay to the said copartnership the excess (if any) of the amount of the sums which he shall actually have received over the sum which he shall have been entitled to receive as his share of the net profits of the said business during such year.

[Insert here articles 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, from Precedent I.[1]]

22. That if either of them, the said A B, and C D, the son, shall die during the continuance of the said copartnership, and the surviving partner shall be desirous to purchase the share of the partner so dying, then a full, true, and particular account shall, within two calendar months next after his decease, be made up, stated, and settled, of the said copartnership trade, and the stock, debts, and effects due, owing or belonging to the same, and the debts and sums of money due and owing therefrom at the time of his decease, and a just valuation and appraisement shall be made of all the particulars included in such account, and as near as reasonably may be, according to the valuation and appraisement made and agreed upon by and between the said partners on the preceding annual settlement of accounts; and that immediately upon such valuation and appraisement being made the surviving partner shall make and enter into a bond jointly with one or more sufficient surety or sureties to be provided by him, and to be approved of by the party required to accept the same, in a sufficient penalty for securing the payment to the executors or administrators of the deceased partner of such sum or sums of money as shall, upon such account, appraisement and valuation as last aforesaid, appear to have been justly due to him at the time of his decease, for or in respect of his share of the said copartnership stock, debts, and effects, and the profits and proceeds thereof after payment of the debts and sums of money due and owing from the same, together with interest for the same from the time of his decease by the installments and in manner following (that is to say), one moiety or half part thereof, with half year's interest upon the whole, at the end of six calendar months to be computed from his decease, and the remaining moiety or half part thereof, with half year's interest thereon, at the end of twelve calendar months to be computed from his decease; and shall also enter into another bond

[1] The usual clauses: 1. Mutual fidelity; 2. Entering into any other business; 3. Hiring or dismissing clerks, etc.; 4. Signing securities; 5. Giving credit, borrowing money and compounding debts; 6. Contract above certain sums; 7. Becoming security; 8. Pay separate debts; 9. Books of account; 10. Annual account; 11. Final account.

jointly with such surety or sureties in a sufficient penalty for indemnifying the executors and administrators of the copartner so dying and his and their estate and effects of and from the payment and performance of all the debts and engagements contracted on account of the said copartnership, and subsisting at the time of his decease, and all actions, suits, judgments, executions, damages, claims, and demands whatsoever on account thereof. And that upon the execution and delivery of such bonds as aforesaid all and every the part, share, right, and interest of the partner so dying of and in the leasehold premises, goods, chattels and stock in trade, moneys, debts, property, and effects whatsoever, due, owing or belonging to the said copartnership at the time of his decease shall belong to and become the absolute property of the surviving copartner, subject only to the payment and performance of the debts and engagements of the said copartnership. And that the executors and administrators of such deceased copartner shall make, do and execute all such acts, deeds, releases, assignments and assurances, matters and things in the law whatsoever as shall be necessary or reasonably required for effectually vesting such last-mentioned part, share, right, and interest in the surviving partner, according to the true intent and meaning of these presents, or for authorizing and enabling him to recover, receive, and dispose of all and singular the said copartnership debts and effects. But if such surviving copartner shall not, within the space of two calendar months next after the decease of the other of them, elect to purchase the share and interest of the copartner so dying, upon the terms hereinbefore expressed, then the said copartnership affairs shall be wound up and settled and the said joint effects shall be divided and disposed of in the same or in the like manner as near as may be as if the said copartnership term of fourteen years had elapsed by effluxion of time.

23. That if any controversy, dispute, doubt, or question shall at any time or times hereafter arise between the said parties hereto, or their respective executors or administrators, touching the construction of these presents, or any clause, article, or stipulation herein contained, or respecting any account, valuation, or appraisement to be made as hereinbefore mentioned, or touching the mode of conducting the affairs of the said copartnership in any event not hereinbefore expressly provided for, or in any manner howsoever touching or concerning the trade and concerns of the partnership hereby established, and such controversy, dispute, doubt, or question shall not be

fully decided and settled between themselves, then, and in every such case, the determination of such controversy, dispute, doubt, or question shall, upon the requisition of either of the parties in difference, such requisition to be made in writing and delivered to the other of them or left at his usual or last known place of abode, be submitted and referred to the hearing and arbitration of three indifferent persons, one of them to be chosen by the party requesting such reference, another of them to be chosen by the other party in difference, or in case of his default for the space of fourteen days next after such requisition made to him for that purpose as aforesaid, then by the arbitrator first nominated as aforesaid, and the third of such arbitrators to be chosen by the two arbitrators so nominated in manner aforesaid. And that the said arbitrators shall meet and proceed to take the matters in difference into consideration at such time and place as they may think proper, and shall and may adjourn such meeting from time to time as they shall see fit, and shall have power to examine the parties in difference and their witnesses on oath touching the matters in difference. And that the award, order, and determination which the said arbitrators, or the major part of them, shall make touching the matters referred to them as aforesaid shall be final, binding, and conclusive to and upon the said parties in difference, and their respective executors and administrators, provided the same shall be made in writing under their hands and seals ready to be delivered to the parties in difference or such of them as shall apply for the same within forty days next after such reference shall be made, or within such enlarged period not exceeding twenty days as the said arbitrators, or the major part of them, shall fix and determine in that behalf by writing under their hands, and that for enforcing the observance of every such award, order, and determination to be made in manner aforesaid, the submission thereto shall be made a rule of His Majesty's Court of King's Bench according to the statute in that case provided, and that, upon the request of either of the parties to any such reference, bonds of arbitration shall be reciprocally made and entered into by them in sufficient penalties in the usual form, and that no action at law or suit in equity shall or may be commenced, instituted, or brought by either of the said parties hereto, his executors or administrators, against the other of them, his executors or administrators, until such other of them, his executors or administrators, shall have declined to submit the alleged cause of such action or suit to arbitration, or until the arbitrators shall have refused

or neglected to make an award pursuant to the provision hereinbefore contained.

24. That the said C D, the son, shall, when and so soon as he shall attain the age of twenty-one years, or within one calendar month thereafter, duly enter into and execute an indenture or deed of covenant in the form or to the effect of the indenture or deed of covenant already prepared and indorsed upon the skin of this present indenture for the purpose of binding himself, his executors and administrators, to the observance and performance of the several articles, stipulations and agreements in these presents contained, and which on his or their part are or ought to be observed and performed according to the true intent and meaning thereof, and that from and immediately after the execution of such indenture or deed of covenant by the said C D, the son, in manner aforesaid, the said C D, the father, shall be absolutely and forever released and discharged of and from all and every the covenants and stipulations hereinbefore contained, and by him made and entered into on behalf of the said C D, the son, as aforesaid, and all liability thereupon, and all actions, suits, claims and demands on account thereof, save and except and without prejudice nevertheless to any right of action or suit which shall or may have previously accrued thereon. And that these presents shall or may be pleaded in bar of any action or suit to be commenced or instituted against the said C D, the father, his heirs, executors, or administrators, contrary to the true intent and meaning of this present proviso, and that in the meantime until the said C D, the son shall attain the age of twenty-one years, and shall execute such indenture or deed of covenant as aforesaid, the said C D, the father, shall be considered merely as a surety or guaranty as between the said A B and the said C D, the son, for the performance of the articles and stipulations hereinbefore contained, by or on the part of the said C D, the son, and shall not in anywise be deemed or regarded as a partner in the said joint trade or business hereby established, or interested in the gains, profits, or losses thereof, any thing hereinbefore contained to the contrary in anywise notwithstanding.

25. And this indenture lastly witnesseth, that in further pursuance and performance of the said recited proposals and agreements, and in consideration of the premises, the said C D, the father, doth hereby, for himself, his heirs, executors, and administrators, covenant with the said A B, his executors, administrators, and assigns, that he, the said C D, the father, his heirs, executors, and administrators, shall and

will well and truly pay, or cause to be paid unto the said A B, his executors, administrators, or assigns, the full sum of £ , on the day of , in the year , in full for the residue of the purchase or consideration money agreed to be advanced and paid by the said C D, the father, for the admission of the said C D, the son, to one-fourth part or share of the said partnership trade or business, and the capital or joint-stock in trade and effects belonging to or employed in the same as aforesaid. In witness, etc.

Deed of covenant indorsed upon the preceding articles of partnership, and executed by C D, the son, on his attaining twenty-one.

This indenture made, etc., between the within named C D, the son, of the one part, and the within named A B of the other part. Whereas, the said C D, the son, attained the age of twenty-one years on the day instant: Now this indenture witnesseth, that for the considerations mentioned in the within written indenture, and particularly in consideration of the covenants, and agreements therein contained on the part of the said A B, he, the said C D, the son, for himself, his heirs, executors, and administrators, doth by these presents covenant and agree with the said A B, his executors, administrators, and assigns, that he, the said C D, the son, his executors, and administrators, will from time to time and at all times well and truly observe, perform, and fulfill all and singular the stipulations and agreements in the within written indenture contained, and which on his or their part are or ought to be observed, performed, and fulfilled, according to the true intent and meaning of the several covenants and agreements by the within named C D, the father, made and entered into, for and on the behalf of the said C D, the son, as therein mentioned, and in as full and absolute a manner in all respects as if the said C D, the son, at the time of the execution of the within written indenture, had been of full age, and had entered into such last-mentioned covenants and agreements in his own person. In witness, etc.

No. XII.

Deed of Partnership between Attorneys.

This indenture made, etc., between A B of, etc., of the one part, and C D of, etc., of the other part, witnesseth, that each of them, the said A B and C D, doth for himself, his heirs, executors, and administra-

tors, covenant with the other of them, his executors and administrators, by these presents in manner following (that is to say) :

1. That the said A B and C D will be partners in the business of attorneys and solicitors for the term of seven years, to be computed from the day of .

2. That the firm of the said partnership shall be .

3. That the business of the said partnership shall be carried on at the offices in where the same is now carried on, or in such other place as the said partners may agree upon.

4. That the capital of the said partnership shall consist of the sum of £ to be brought in by the said A B and C D in the shares following, namely, two-thirds thereof by the said A B, and the remaining one-third thereof by the said C D. And on the day of when the said C D will become entitled to an increased share of the business, he shall pay the sum of £ to the said A B, and thereupon be considered to have brought in shares in this capital.

5. That the rent of the offices in which the business of the said partnership shall be carried on, and all repairs and taxes, the salaries of all clerks, and all necessary expenses which shall be incurred in the business of the said partnership, and all debts due and to become due upon or on account of the same, and all losses which may happen in the business thereof and interest of all moneys (if any) to be borrowed by the said partnership, and on the shares of the said partners respectively in the said capital, after the rate of 5*l.* per cent per annum (which is hereby agreed to be allowed to them respectively,) shall be paid out of the gains, and profits, and capital of the said partnership, or in case the same shall be deficient, then by the said partners, their executors or administrators, according to their respective shares in the capital and profits of the said partnership.

6. That the said capital and the gains and profits arising from the same shall be employed in the business of the said partnership, and the said partners shall be entitled thereto in the shares following (that is to say), during the first years of the said partnership the said A B to shares thereof, and the said C D to the remaining shares thereof, and during the last years of the said partnership, the said A B to shares thereof, and the said C D to the remaining shares thereof.

7. That when and so often as either of the said partners shall hold any official situation, either of them will assist in the performance of the business thereof, and the salary and other profits to be received in

respect thereof shall be considered part of the profits arising from the business of the said partnership.

8. That neither of the said partners will take any articled clerk, or hire or keep any clerk or servant in the business of the said partnership against the consent of the other of them, and that any premium or sum of money received in respect of any articled clerk shall be considered part of the profits of the business of the said partnership.

9. That in every calendar month during the said partnership on the day of in every such month, by way of subsistence money, the said partners may take out and receive the sums of money hereinafter mentioned (that is to say), the said A B the sum of £ and the said C D during the first three years of the said partnership the sum of £ , and during the last four years thereof the sum of £ , and the said sums respectively at the time of taking out the same shall be entered in the cash-book belonging to the said partnership, and carried to the debits of the respective accounts of the said partners in part of their shares of the profits of the said business; but in case at the end of any year it shall appear upon taking the general annual account that the net profits of such year shall not have amounted to the sum of £ (the total amount drawn out by both partners during the year), then and in such case immediately after such general annual account shall have been taken, each of them, the said A B and C D, shall repay to the said partnership the excess (if any) of the amount of the sums which he shall actually have received over the sum which he shall have been entitled to receive as his share of the net profits of the said business during such year.

10. That if either of the said partners shall bring into the business any sum or sums of money beyond his share of the capital with the consent of the other partner, the same shall be entered in the cash book of the said partnership as a debt due from the said partnership to the partner lending the same, and shall be a charge upon the partnership estate and carry interest after the rate of 5*l.* per cent per annum, which shall be paid by half-yearly payments before any division of profits shall be made. And if the party lending any such money shall neglect to take back the same upon receiving six calendar months' previous notice in writing for that purpose from the other partner, interest thereon shall cease from the expiration of such notice.

11. That when any sum or sums of money shall be received from any client or clients in respect of any debt or debts, part of which

shall be owing to the said A B for business done by him prior to the commencement of the said partnership, the same shall be applied in payment of the part thereof due to the said A B in preference to any part of the debt due to the said partnership.

[Insert here Article 9, from precedent 1.]

13. That neither of the said partners will directly or indirectly engage in any business except upon the account of the said partnership without the consent in writing of the other.

14. That neither of the said partners will, without the consent in writing of the other, employ any of the moneys or effects of the said partnership, or engage the credit thereof, or act as an attorney at law for or on behalf of any person whatsoever, or undertake any professional business whatsoever, except upon the account and for the benefit of the said partnership.

15. That neither of the said partners will lend any moneys or do any business on account of the said partnership to or for any person or persons whom the other shall have previously forbidden him (by notice in writing) to trust, or borrow any money on account of the said partnership, or compound any debt or debts due to the said partnership.

[Insert here Articles 15, 16, from Precedent I.]

18. That all proper books of account shall be kept by the said partners, which, with all bills, deeds, letters, and other writings which shall from time to time concern the said partnership, shall be kept at the offices of the said partnership, and the said partners shall have free access at all times to examine and copy out or take extracts from the same.

19. That on the day of next and every succeeding day of during the said partnership, a general account in writing shall be made of all such business as shall have been transacted by the said partners, and of all the moneys, debts, and effects belonging to, and all the debts due from the said partnership, and of all such other things as are usually comprehended in annual accounts of the like nature, and that a just valuation shall be made of the particulars included in such account which are susceptible of valuation, and that a fair copy of such general account and valuation shall be entered in two books and signed in each such book by both of them, the said A B and C D, within three calendar months of the approval of each such account, and after such signatures each of the said partners shall take one of the said books. And the said partners shall be bound by such

account and valuation signed as aforesaid, unless some manifest error shall be found therein and signified by either of the said partner to the other within twelve calendar months then next, in which case such error shall be rectified. And as soon after the finishing of every such account respectively as the same can be conveniently paid, the gains and profits which shall have arisen by the business of the said partnership, during the time to which such accounts respectively shall extend, shall be divided between the said partners in the proportions hereinbefore mentioned.

20. That within six calendar months after the expiration of the said term of seven years a full account in writing shall be made and settled of all the moneys, debts and effects belonging to, and all the debts due from the said partnership, and that a joint valuation shall be made of the particulars included in such amount which require and are susceptible of valuation, and thereupon the said partners shall forthwith pay the debts owing by the said partnership, and the balance of the said partnership capital and effects, and the profits thereof, or other the matters to be included in such general account, shall be divided between the said partners, their respective executors, administrators or assigns, in the proportions hereinbefore mentioned. And after making such division, such instruments in writing shall be executed by the said partners respectively for getting in the debts outstanding, and for indemnifying each other concerning the premises, and for vesting the whole property in the said respective shares of, and in the debts and effects in the parties to whom the same respectively shall upon such division belong, and for releasing to each other all claims on account of the said partnership, as are usual in cases of the like nature.

21. That in case either of the said partners shall depart this life during the said partnership,[1] the surviving partner shall be entitled to the share of him so dying of and in the said business, and the gains and profits thereof accruing, after the yearly account or rest, as hereinafter mentioned; and the executors or administrators of the deceased partner shall be entitled, if such death shall happen before the day hereinbefore appointed for the first yearly general account, or rest and valuation, to the share of the capital belonging to such deceased partner as aforesaid, or if the same shall happen after the day appointed

[1] A person paying a premium on his introduction as a partner in a professional business should keep in view the consequence of the absence of stipulation respecting the good-will in the event of his death.

for the first yearly account or rest, to such sum of money as the share of the deceased partner in the capital, debts, and effects of the said partnership shall, upon the balance of the last yearly general account, rest and valuation as aforesaid, amount to, or such share would have amounted to, if such yearly account had been taken on the day of immediately preceding such death; and also to an allowance after the rate of 5*l.* per cent per annum upon the capital or balance in favor of such deceased partner, as the case may happen, in lieu of the profits from the commencement of the said partnership, or from the last general account or rest and valuation (as the case may happen), to the time of such death; such allowance in lieu of profits to be paid by the surviving partner, his heirs, executors, or administrators on demand; and such other sum of money as the executors or administrators shall become entitled to as aforesaid, with interest for the same in the meantime after the rate of 5*l.* per cent per annum from the decease of the partner so dying, to be paid in manner following (that is to say), one-third part thereof with interest for the whole at the expiration of six calendar months next after such decease, one other third part with interest for two-third parts thereof from the end of such six calendar months at the expiration of twelve calendar months next after such decease, and the remaining one-third thereof with interest for the same from the end of such twelve calendar months at the expiration of eighteen calendar months next after such decease.

22. That the surviving partner shall also pay to the executors, administrators, or assigns of the deceased partner during the remainder of the said term of seven years, if such surviving partner shall so long live, the annuity hereinafter mentioned (that is to say), if the said A B shall be the deceased partner, the annuity of £ , and if the said C D shall be the deceased partner, the annuity of £ ; the said annuity to be paid by two half-yearly payments on the day of and the day of in every year, without any deduction whatsoever, the first half-yearly payment thereof to be made on such of the said days as shall first and next happen after the decease of the partner first dying.

23. That, for security to the executors, administrators or assigns of the deceased partner such sum of money in and by the installments aforesaid and the said annuity, the surviving partner, his executors or administrators, shall, within one calendar month next after such decease, give two bonds unto the executors, administrators or assigns

of the deceased partner, one of them in a penalty double the amount of the principal moneys to be thereby secured, and the other for securing the payment of said annuity in a penalty of £ .

24. That the surviving partner, his executors or administrators, shall also give to such executors or administrators another bond in a sufficient penalty for indemnifying them and the estate of the deceased partner from the debts owing by the said partnership, and all actions, suits, damages and expenses thereof, and the said executors or administrators of the deceased partner shall release and assign unto the surviving partner, his executor or administrator, all their share and interest in the said capital, effects and debts belonging and owing to the said partnership.

25. That, in case, at any time during the said partnership, the said A B shall, by any writing under his hand, desire that his son A B may, for the remainder of the said term of seven years, be admitted into the said partnership, and shall also give or transfer to his son any part of his share in the said partnership and the capital thereof, then the said A B, the son, shall be entitled to the part of the share of the said father's estate which shall be so transferred to him, in the same manner, subject to the same conditions to all intents and purposes whatever as his said father would himself have been entitled to the same if he had continued possessed thereof. And, thereupon, the said A B, the father, and the said C D, and the said A B, the son, shall execute all such acts and deeds as shall become necessary or requisite to confirm and substitute the said A B, the son, in the said part of the share of the said A B, the father, and to subject him, the said A B, the son, to the same debts, demands and other conditions and agreements as the said A B, the father, would have been subject to in respect thereof by reason of the business of the said partnership.

26. That, if any difference shall, at any time or times hereafter, arise between the said partners or between either of them and the executors or administrators of the other of them, or between their respective executors and administrators, in anywise relating to these presents, on any account or valuation to be made as aforesaid or otherwise concerning the said partnership, which shall not be decided within one calendar month, then and as often as the same shall happen, such difference shall, upon the request of either of the said partners or the executors or administrators of either of them, be reduced into writing and referred to the award of three indifferent

persons, one to be chosen by each of the persons differing, and a third by the two persons first chosen, within two calendar months next after such request. And the award of such three persons or any two of them in the matter referred to them shall be conclusive upon the said parties if made in writing within twenty-eight days after the said three persons shall have been elected as aforesaid, or in such further reasonable time as the said arbitrators shall appoint for making the award.

27. That, if either of the said partners, his executors or administrators, shall neglect or refuse to choose an arbitrator on his or their behalf, or shall name a person who shall neglect or refuse to act as such arbitrator for the space of two calendar months after either of them, his executors or administrators, shall have requested him or them to refer any difference to arbitration, it shall be lawful for the person chosen arbitrator by the party making such request to choose an arbitrator on the part of the party who or the arbitrator named by whom shall so refuse or neglect, whereof notice shall be immediately sent to the party who or the arbitrator named by whom shall so refuse or neglect, and that the two persons chosen arbitrators as last aforesaid shall choose an umpire, and the award or umpirage of the persons so chosen as lastly hereinbefore is mentioned, or any two of them, shall be as effectual and conclusive as if the person chosen arbitrator by the arbitrator of the party requesting, on behalf of the party refusing or neglecting, had been chosen by him. That, for the better enforcing the award to be made as aforesaid, the reference or submission in respect of the same shall be made a rule of His Majesty's Courts of King's Bench, Common Pleas, and Plea side of the Exchequer, according to the statutes in that case made and provided.[1] In witness, etc.

[1] It might probably be found more useful to substitute for the arbitration clauses the following clauses. See 7 Jarm. Conv. 143, n. (*f*.)

"That in the event of the determination of the said partnership, by the decease of either of the said partners, during the said term of seven years, the printed books, office fixtures and furniture, and other property of the said partnership (except as hereinafter mentioned) shall be valued by two indifferent persons, one to be chosen by the surviving partner, and the other by the executors or administrators of the deceased partner, and the same shall be purchased by the surviving partner, if he shall think fit, at the amount of such valuation, and the sum so to be paid by him shall form part of the partnership effects; but that all deeds, drafts of deeds, and other papers belonging to clients or otherwise, which shall be in custody of the said partners or either of them, on account of the said partnership, at the time of the decease of either of them as aforesaid, shall (subject to the claims of the persons, if any, to whom they may happen to belong) remain in the hands of or be delivered to the surviving partner.

"That, in case of the dissolution of the said partnership, by effluxion of time or otherwise, during the lives of

No. XIII.

Deed of Partnership between Coal Merchants, with Provision for substituting a Minor, when of age.

This indenture, made, etc., between A B, of, etc., coal merchant, of the first part, C D, of the same place, coal merchant, of the second part, E F, of, etc., gentleman, of the third part, and G H, of, etc., nephew of the said E F, and an infant of the age of 19 years and a half, or thereabouts, of the fourth part. Whereas the said A B and C D have for some years last past carried on the trade or business of coal merchants, at aforesaid, at and for their joint and equal risk and benefit. And whereas the said A B and C D are possessed of and entitled unto a stock in trade, consisting of barges, lighters wagons, carts, horses, and other effects and things necessary for carrying on the said trade or business. And whereas the said A B, with the privity and approbation of the said C D, did lately agree to sell or dispose of a moiety of his share or interest of and in the said trade or business unto the said E F, at or for the price or sum of £ . And whereas, upon the treaty for the said sale it was agreed that a valuation should be made of the said stock in trade of the said A B and C D, and that the said E F should pay to the said A B one-fourth part of the sum of money at which the same should be valued, and that the said E F should be thenceforth entitled to one-fourth part of the said stock in trade, and of the gains and profits of the

---

both the said partners, they, the said partners, shall, as soon as conveniently may be after such dissolution, make out a general statement of the partnership affairs and transactions and pecuniary accounts; and, after making an effectual provision for the liquidation of the debts owing from the said partnership, shall make a distribution, division and allotment of the partnership credits, property and effects between them, according to their several proportions and interests therein, or, in case it shall be deemed more expedient so to do, the same credits, property and effects shall be collected, got in and converted into money on the joint account of the said partners, and the deeds, drafts of deeds, and other documents and papers in the custody of the said parties respectively, as such partners as aforesaid, shall be divided between them in the manner following (that is to say): The papers relating to the business of persons who were clients of either of the said partners before the formation of the said partnership, shall (unless the contrary be expressly directed by such clients) be committed to the custody of the partner whose clients such persons formerly were, and, with respect to the papers relating to the business of clients not included in this class, the same shall be equally divided between the said partners, and, in case any dispute shall arise as to the custody of the papers in any particular business, it shall be referred to the client to whose business they relate, to determine to which of the partners the said papers shall be delivered. Provided, nevertheless, that nothing herein contained shall prejudice or affect any lien which the said parties may have, either on the partnership account or otherwise, or any deeds or writings in their respective hands or custody. In witness, etc.

said business, and that the said A B, C D, and E F should become copartners in the said trade or business for the term or time, and in manner, and under and subject to the provisions, conditions, covenants, and agreements hereinafter expressed and contained. And whereas, the said E F hath this day paid the said sum of £ , and, also, the sum of £ , being one-fourth part of the said sum of £ unto the said A B, as he, the said A B, doth hereby admit and acknowledge. And whereas the said E F entered into the aforesaid agreements for the benefit of the said G H, from the time of his attaining the age of 21 years, and it was agreed between the said parties that the said E F should assign his share or interest of and in the said trade or business, and the said stock in trade, unto the said G H, in case he should live to attain the age of 21 years, on payment by the said G H to the said E F of the sum of £ , and of such further sum of money as the share or interest of the said E F, of and in the then stock in trade should be valued at, and that the said G H should in the meantime, until he should attain the age of 21 years, manage and conduct the said trade or business on behalf of the said E F: Now this indenture witnesseth, that for effectuating the aforesaid agreements, and in consideration of the premises and of the mutual trust and confidence which the said A B, C D, and E F have in each other, each and every of them the said A B, C D, and E F, for himself, his heirs, executors, and administrators, doth covenant and agree with and to the said others and every other of them, their and his executors and administrators, by these presents in the manner following (that is to say):

1. That they, the said A B, C D, and E F, will be copartners in the trade or business of a coal merchant, for the term of 14 years, commencing from the day of the date of these presents.

2. That the firm or style of the said copartnership shall be

3. That the trade or business of the said copartnership shall be carried on at aforesaid, or in or at such other place or places as the said partners shall from time to time fix and agree upon.

4. That the capital of the said copartnership shall consist of the aforesaid stock in trade now used in carrying on the said joint trade; and the said capital, and the increase thereof, and the profits arising therefrom, shall (subject as hereinafter is mentioned) be employed in the said business; that the said A B, C D, and E F, shall be entitled to the said capital, and so much of the gains, profits, and produce thereof as shall remain after all payments hereinafter directed to be

made thereout shall have been made in the following proportions, namely, the said A B to one-fourth part thereof, the said C D to two other fourth parts thereof, and the said E F to the remaining one-fourth part thereof.

5. That the rent of the house and buildings in aforesaid, or of any other house or buildings, where the said trade or business of the said copartnership shall be carried on, and all repairs, additions, and alterations of, to, and in the same, and all taxes, rates, assessments, payments for insurance and other payments whatsoever in respect of the same; and the wages or maintenance of clerks, apprentices, or servants, respectively, who shall be employed in the business of the said copartnership, and all necessary and proper charges and expenses which shall be occasioned or incurred in or about the trade or business of the said copartnership, or in anywise relating thereto; and all debts and duties which shall be owing for or upon account of the said trade or business, and all losses and damages which may happen in the same shall be sustained, paid, and borne by and out of the capital of the said copartnership and the gains and profits arising from the same, or in case the same shall become deficient, then by all of them, the said A B, C D, and E F, out of their respective separate estates, in the shares and proportions following (that is to say), one-fourth share thereof by the said A B, two other fourth shares thereof by the said C D, and the remaining fourth share thereof by the said E F.

6. That in each year during the said copartnership it shall be lawful for the said A B to have and take out of the clear net gains and profits of the business of the said copartnership by four even and equal quarterly payments on the day of , the day of , the day of , and the day of , in every year the sum of £ for his separate use, the first quarterly payment thereof to be made on the day of now next ensuing. And that in each year during the said copartnership it shall be lawful for each of them, the said C D and E F, to have and take out of the net gains or profits of the trade or business of the said copartnership, by four even or quarterly payments on or at the days or times hereinbefore mentioned, the sum of £ for his respective separate use; the first payment thereof respectively to be made on the day of now next ensuing.

[Insert here the provision for refunding in case of excess, from Precedent I, article 8.]

7. That they, the said A B, C D, and E F, will, at all times during the continuance of the said copartnership, diligently and faithfully employ themselves in and about the business of the said copartnership, and carry on and conduct the same for the greatest benefit and advantage of the said copartnership; but, nevertheless, the said E F shall not be compelled to attend to, carry on and conduct the same during such time as the said G H shall attend to, carry on and conduct the same as aforesaid, for and on the behalf of him, the said E F, and he, the said E F, will use his utmost endeavors to cause and procure the said G H to attend to and conduct the same accordingly. And that each and every of them, the said A B, C D, and E F, will be just and faithful to the others and other of them in all buyings, sellings, accounts, reckonings, receipts, payments, dealings, and transactions, in and about the premises, and will give and render to the others and other of them a just and faithful account of the same when and so often as the same shall be required; and upon every reasonable request of the others, or any other of them, inform the others or other of them of all such letters, accounts, writings, and other things which shall or may come to his or their hands or knowledge in anywise concerning the trade or business of the said copartnership.

8. That none of them, the said A B, C D, and E F, will, without the consent in writing of the others or other of them, employ any of the moneys, goods, or effects belonging to the said copartnership, or engage the credit thereof in any matter or thing except upon the account or for the use and benefit of the said copartnership. And that neither of them, the said A B, C D, and E F, will, either by himself or with any other person or persons whomsoever, directly or indirectly engage in any trade, manufacture, of business except upon the account and for the benefit and advantage of the said copartnership.

9. Insert here article 11, from Precedent I.

10. That in all cases where there shall be occasion to give any bond, note, or other security for any sum or sums of money on account of the said copartnership (other than and except where the contrary shall in the common course of business be unavoidable), the same shall be respectively signed and executed by all of them, the said A B, C D, and E F; and that if any of them, the said A B, C D, and E F, shall give any such bond, note, or other security (except in the cases before mentioned) which shall not be executed and signed by the others or other of them, every such bond, note, or other security

shall be deemed to be given on the separate account of the person or persons giving the same, and he and they shall accordingly pay, satisfy, and discharge the same out of his or their own separate estate, and shall indemnify and save harmless the others or other of them and their and his heirs, executors, and administrators, and their and every of their estate and estates of, and from the payment thereof, and of and from all actions, suits, costs, damages, and expenses which may be incurred on account thereof.

11. That none of them, the said A B, C D, and E F, will, at any time during the continuance of the said copartnership, lend any of the moneys or deliver upon credit any of the goods or stock in trade of, or belonging to the said copartnership, to any person or persons whom the others or other of them shall, before the lending or delivering of such moneys, goods, or stock in trade, have forbidden him or them by notice in writing to trust; and that if any of them, the said A B, C D, and E F, shall lend any money or deliver upon credit any of the goods or stock in trade of or belonging to the said copartnership after such notice given as aforesaid, then and in such case the party so lending or delivering upon credit any such money, goods, or stock in trade as aforesaid shall pay to the said copartnership so much ready money as the full amount or value of the money, goods, or stock in trade which he shall so lend or deliver upon credit as aforesaid shall amount unto or be valued at.

12. That none of them, the said A B, C D, and E F, will, without the consent of the others or other of them in writing first had and obtained, enter into any bond or become bound as bail, surety, or security with or for any person or persons whomsoever, or underwrite any policy of insurance, or do or willingly suffer to be done any act, matter, or thing whatsoever whereby the stock in trade of the said copartnership may be seized, attached, extended, or taken in execution.

13. That each of them, the said A B, C D, and E F, will from time to time duly and punctually pay and discharge the debts now due and owing, or hereafter, during the continuance of the said copartnership, to be due and owing from him to any person or persons whomsoever; and will at all times hereafter, during the continuance of the said copartnership, save, defend, and keep harmless and indemnified the others and other of them, their and his heirs, executors, and administrators, and the stock of the said copartnership, and the increase thereof, of and from all their respective private and separate debts

and engagements already contracted or entered into, or hereafter during the continuance of the said copartnership to be contracted and entered into, and of and from all actions, suits, costs, charges, damages, and expenses on account thereof.

14. Insert here article 17, from Precedent I.

15. Insert here article 18, from Precedent I.

16. That within the space of six calendar months next after the expiration or determination of the said copartnership, a true, full, and particular account, in writing, shall be made, settled, and stated between the said copartners of all the stock in trade, moneys, debts, and effects then belonging or owing to, and of all debts due from the said copartnership, and thereupon the said A B, C D, and E F shall forthwith pay or take good order for the safe and speedy payment of the debts owing by the said copartnership. And the said A B, C D, and E F and their respective executors, administrators, and assigns shall be entitled to the balance of the said stock in trade of the said copartnership, and the increase thereof in manner hereinbefore mentioned, and the same shall be divided amongst them accordingly.

17. That each of them, the said A B, C D, and E F, will give unto the others and other of them a bond in a sufficient penalty for the payment of their respective shares, and proportions of the debts owing by them in respect of the said copartnership, and for the saving harmless and indemnifying each other of them, his heirs, executors, and administrators, of and from each other's share, or proportion of such debts, and all costs, damages and expenses on account thereof.

18. That each of them, the said A B, C D, and E F, will immediately, upon such division as aforesaid, well and sufficiently assign unto each other entitled thereto, under or by virtue of these presents, his executors, administrators, and assigns, his share of all such debts and sums of money as shall then be due and owing to the said parties on account of the said copartnership, and authorize and empower him or them to recover and receive the same, and to do and execute all such other acts, deeds, matters, things, assignments, and assurances in the law whatever as shall be necessary or expedient for vesting the sole right and property therein in the partner to whom the same shall upon such division belong.

19. That after such division shall be made between the said parties, none of the said parties, his executors or administrators, will discharge any debt or debts which shall on the division be allotted and assigned to the others or other of them, or in any respect interfere in the receipt

or recovery thereof, or otherwise, except upon the express request of the person or persons to whom the same shall be allotted or assigned.

20. That if the said A B shall be minded or desirous to quit the said copartnership before the expiration of the said term of fourteen years, it shall be lawful for him to do so upon giving three months' previous notice in writing to the said C D and E F, or their respective executors or administrators, and thereupon, at the expiration of the said three calendar months, a true, full, and particular account in writing shall be made, stated, and settled between the said partners of all the stock, moneys, debts, and other things belonging to or owing from the said copartnership, and a just valuation and appraisement shall be made of all particulars included in such account by two persons, one to be chosen by the said A B, his heirs, executors, or administrators, and the other to be chosen by the said C D and E F, or their respective executors or administrators, and in case the said two persons so to be chosen as aforesaid shall not agree in the premises, then by some indifferent person to be chosen as umpire by such two persons. That if the said A B shall die during the continuance of the said copartnership, such account and valuation shall immediately after his death be taken and made as hereinbefore is directed to be taken and made in case the said A B shall quit the said copartnership. That in either of the cases or events lastly hereinbefore mentioned, the said C D and E F, their respective executors and administrators, shall thenceforth be entitled to the whole of the said stock in trade, and the increase thereof, and the net gains and profits of the same in the shares following (that is to say) the said C D, his executors and administrators, to two-third shares thereof, and the said E F, his executors or administrators, to the remaining third part thereof, and the said A B, his executors or administrators, shall be entitled to one-fourth part of the sum of money to which such valuation as aforesaid shall amount, the same to be secured to be paid with interest for the same after the rate of 5*l.* per cent per annum by the installments and in the manner hereinafter mentioned (that is to say) the said C D and E F, or their respective executors or administrators, will, immediately on such valuation being so made as aforesaid, duly execute and deliver unto the said A B, his executors or administrators, a joint and several bond in double the principal, conditioned for the payment of the same sum with interest after the rate aforesaid from the expiration of the said three calendar months, for which such notice shall be given as aforesaid, or from the death of the

said A B, as the case may be, in the manner following (that is to say), one-fourth part with interest for the whole immediately after the expiration of six calendar months next after the expiration of the said three calendar months, or the death of the said A B, as the case may be, one other fourth part thereof with interest for three-fourth parts thereof to be computed from the end of such six calendar months, immediately after the expiration of twelve calendar months, next after the expiration of the said three calendar months, or the death of the said A B (as the case may be) one other fourth part thereof with interest for two-fourth parts to be computed from the end of such twelve calendar months immediately after the expiration of eighteen calendar months next after the expiration of the said three calendar months, or the death of the said A B (as the case may be) and the remaining fourth part thereof with interest for the same to be computed from the end of such eighteen calendar months immediately after the expiration of twenty-four calendar months next after the expiration of such three calendar months, or the death of the said A B (as the case may be).

22. That as between them, the said C D and E F, and their respective executors and administrators, the said C D, his executors or administrators, will pay two-third parts of the sum of money and interest, to be secured by the aforesaid bond, and the said E F, his executors or administrators, will pay the remaining third part of the said sum of money and interest. And in either of the cases or events hereinbefore mentioned, the said C D and E F, or their respective executors or administrators, will also execute and give one other bond in a sufficient and reasonable penalty unto the said A B, his executors and administrators (as the case may be) for indemnifying him and them, and his and their estate and effects, of and from all the debts which shall be owing by the said parties on account of the said copartnership at the time the said A B shall quit the same, or at the time of his decease as aforesaid (as the case may be) and of and from all actions, penalties, judgments, executions, extents, charges, damages, and demands whatsoever, which may arise, happen, or become payable for or concerning the said debts, or any of them, or otherwise, howsoever, on account of the said copartnership and the trade thereof.

23. That the said A B, his executors or administrators (as the case may be), will at the request, costs, and charges of the said C D and E F, their executors or administrators, such costs and charges to be

paid out of the stock of the said copartnership, release and assign unto them, the said C D and E F, their executors or administrators, all his or their share, right, title, and interest of, in, and to the joint stock and estate, debts, and effects belonging, due, or owing to the said copartnership, and all matters and things thereunto belonging, and, as far as he or they can, empower and enable the said C D and E F, their executors or administrators, to recover and receive the same.

24. That if the said C D or E F shall die during the continuance of the said copartnership, no benefit of survivorship shall accrue therefrom to the other of them, but in any such case the executors or administrators of the party so dying shall stand in his place with respect to his share in the said stock and effects and the profits thereof, until the determination of the said copartnership, save and except with respect to the management of the said trade or business, which shall exclusively belong to the surviving partners or partner for the time being.

25. Provided always, that if either of them, the said C D or E F, shall die during the continuance of the said copartnership, then and in such case the surviving partner shall during the remainder of the said copartnership, if he shall so long live, be entitled, as and for a compensation for the additional trouble which he will have in the management of the business, by reason of the decease of the partner so dying, to have and take out of the net gains and profits of the said copartnership, such an annual sum of money as shall be fixed upon for that purpose by two persons, one to be chosen by the surviving partners or partner, and the other to be chosen by the executors or administrators of the party so dying within the space of one calendar month next after the decease of such party, and in case the said two persons shall not agree in the premises, then such an annual sum of money as shall be fixed upon for that purpose by some indifferent person, to be chosen as umpire by the two persons first chosen, the said annual sum to be over and above the share of such surviving partner of and in the gains and profits of the said copartnership. But nevertheless, at the expiration of the said copartnership, the joint stock thereof shall be divided in such and the same manner in all respects as the same would have been divided in case both of them, the said C D and E F, had been then living.

(The arbitration clause may be here inserted. But see Ch. VIII, pl. 17).

said A B, as the case may be, in the manner following (that is to say), one-fourth part with interest for the whole immediately after the expiration of six calendar months next after the expiration of the said three calendar months, or the death of the said A B, as the case may be, one other fourth part thereof with interest for three-fourth parts thereof to be computed from the end of such six calendar months, immediately after the expiration of twelve calendar months, next after the expiration of the said three calendar months, or the death of the said A B (as the case may be) one other fourth part thereof with interest for two-fourth parts to be computed from the end of such twelve calendar months immediately after the expiration of eighteen calendar months next after the expiration of the said three calendar months, or the death of the said A B (as the case may be) and the remaining fourth part thereof with interest for the same to be computed from the end of such eighteen calendar months immediately after the expiration of twenty-four calendar months next after the expiration of such three calendar months, or the death of the said A B (as the case may be).

22. That as between them, the said C D and E F, and their respective executors and administrators, the said C D, his executors or administrators, will pay two-third parts of the sum of money and interest, to be secured by the aforesaid bond, and the said E F, his executors or administrators, will pay the remaining third part of the said sum of money and interest. And in either of the cases or events hereinbefore mentioned, the said C D and E F, or their respective executors or administrators, will also execute and give one other bond in a sufficient and reasonable penalty unto the said A B, his executors and administrators (as the case may be) for indemnifying him and them, and his and their estate and effects, of and from all the debts which shall be owing by the said parties on account of the said copartnership at the time the said A B shall quit the same, or at the time of his decease as aforesaid (as the case may be) and of and from all actions, penalties, judgments, executions, extents, charges, damages, and demands whatsoever, which may arise, happen, or become payable for or concerning the said debts, or any of them, or otherwise, howsoever, on account of the said copartnership and the trade thereof.

23. That the said A B, his executors or administrators (as the case may be), will at the request, costs, and charges of the said C D and E F, their executors or administrators, such costs and charges to be

said E F, his executors and administrators, shall be desirous to quit the said copartnership before the expiration of the said term of fourteen years, it shall be lawful for him or them so to do upon giving three calendar months' previous notice in writing to the said A B and C D, or their respective executors or administrators, and thereupon, at the expiration of the said three calendar months, a true, full, and particular account in writing shall be made, stated, and settled between the said partners of all the stock, moneys, debts, and other things belonging, due, or owing to or from or by the said copartnership, or any person or persons by reason of the said business, and a just valuation and appraisement shall be made of all the particulars included in such account by two persons, one to be chosen by the said E F, his executors or administrators, and the other to be chosen by the said A B and C D, or their respective executors or administrators, and in case the said two persons so chosen, as aforesaid, shall not agree in the premises, then by some indifferent person to be chosen as umpire by such two persons.

28. That in the case hereinbefore mentioned, the said A B and C D, their respective executors or administrators, shall thenceforth be entitled to the whole of the share of the said E F, his executors or administrators, of and in the said stock in trade, and the increase thereof, and the net gains and profits of the same in equal shares and proportions, and the said E F, his executors or administrators, shall be entitled to one-fourth part of the sum of money to which such valuation as aforesaid shall amount, the same to be secured to be paid with interest for the same after the rate of 5*l.* per cent per annum, by the installments and in the manner hereinafter mentioned (that is to say) : the said A B and C D, their respective executors or administrators, will, immediately upon such valuation being so made as aforesaid, duly execute and deliver unto the said E F, his executors or administrators, a joint and several bond in double the principal conditioned for the payment of the same money, with interest after the rate aforesaid, from the expiration of the said three calendar months, for which such notice shall be given as aforesaid, in the manner following (that is to say) : one-fourth part thereof with interest for the whole immediately after the expiration of six calendar months next after the expiration of the said three calendar months ; one-fourth part thereof with interest for three-fourth parts thereof, to be computed from the end of such six calendar months, immediately after the expiration of twelve calendar months after the expiration of

the said three calendar months; one other fourth part thereof with interest for two-fourth parts thereof, to be computed from the end of such twelve calendar months, immediately after the expiration of eighteen calendar months next after the expiration of the said three calendar months; and the remaining one-fourth part thereof with interest for the same, to be computed from the end of such eighteen calendar months, immediately after the expiration of twenty-four calendar months next after the expiration of the said three calendar months.

29. That the said A B and C D for their respective executors or administrators will also execute and give one other bond in a sufficient and reasonable penalty unto the said E F, his executors or administrators, for the indemnifying him and them, and his and their estate and effects, of and from all the debts and sums of money which shall be due or owing by the said parties on account of the said copartnership at the time the said E F, his executors or administrators, shall quit the same, and of and from all actions, penalties, judgments, executions, extents, charges, damages, and demands, whatsoever, which shall or may arise, happen or become payable for or concerning the said debts or any of them, or otherwise howsoever on account of the said copartnership and the trade thereof.

30. That the said E F, his executors or administrators, will, at the request, costs, and charges of the said A B and C D, their respective executors or administrators, release and assign unto the said A B and C D, their respective executors and administrators, all his or their share, right, title, and interest of, in, and to the joint stock and estate, debts and effects belonging, due, or owing to the said copartnership, and all matters and things thereunto belonging, and as far as he and they can empower and enable the said A B and C D, their executors and administrators, to recover and receive the same.

31. And lastly, it is hereby declared and agreed between and by the said parties to these presents, that the said E F, his executors or administrators, shall not be considered as a trustee for the said G H, of the profits of the said trade or business before the said G H shall attain the age of twenty-one years, but the said E F, his executors or administrators, shall in the meantime be considered in the said business at and for his and their own proper risk and benefit. In witness, etc. . .

No. XIV.

Deed[1] *where one of the parties is to receive ten per cent on the capital to be advanced by him for a specified time, without being liable to losses, and at the end of the time the sum advanced by him is to be repaid by him.*

This indenture made the day of between A B, of, etc., of the first part, C D, of, etc., of the second part, and E F, of, etc., of the third part. Whereas the said A B and C D have for several years passed carried on the trade or business of in street, in the city of as partners, and have proposed and agreed to admit the said E F into the said business upon the conditions and subject to the covenants hereinafter contained: Now this indenture witnesseth that in pursuance of the said agreement each of them, the said A B, C D, and E F, doth for himself, his heirs, executors, and administrators, hereby covenant with the other and others of them, and the executors or administrators of the other and others of them in manner following, that is to say:

1. That they, the said A B, C D, and E F, will carry on together the said business of from the day of for the term of seven years thence next ensuing.

2. That in case at any time, during the said term of seven years, the said E F shall be desirous of retiring from the said business, and shall give to the said A B and C D, or leave for them at the counting-house of the said business, calendar months' notice in writing of such his desire; then at the expiration of such notice the said E F shall be at liberty to retire from the said business accordingly.

3. That the said business shall be carried on in the same warehouse and premises and under the same style or firm as it has been heretofore carried on by the said A B and C D.

4. That the capital requisite for carrying on the said business shall be advanced by the said parties respectively in the proportions following: The said E F shall advance and bring in the sum of £ , and the said A B and C D shall advance and bring in such further sum and sums of money as shall be requisite for carrying on the said business in equal proportions. And the said E F shall be entitled to the

[1] It would not be strictly correct to call this a deed of partnership, for there is clearly no partnership as between E F and the other two, though there is as between A B and C D. Grace v. Smith, 2 W. Bl. 998.

said sum of £ , part of the said capital, without any deduction whatsoever, and shall in every year during the continuance of this present agreement receive out of the produce of the said business, and if such produce shall be insufficient, then out of the capital of the said business the sum of £ in full satisfaction of his share of the produce thereof, to be paid in equal half-yearly payments on the day of , and the day of , and that the residue of such capital and of such produce (if any) shall belong to the said A B and C D in equal proportions.

5. That the rents of all houses or buildings where the said business shall be carried on, and the costs of all repairs and alterations, and all taxes, rates, assessments, payments for insurance, and other outgoings whatsoever in respect of the same, and the salaries, wages or maintenance of all persons employed in the said business, and all other moneys which shall become payable on account of the said business, and all losses and damages which shall happen in the same, shall be paid, defrayed, and borne exclusively by and out of the respective shares of the said A B and C D in the capital of the said business, and the gains and profits arising from the same, or in case the same shall become deficient, then by the said A B and C D out of their respective separate estates in equal shares.

6. That the said E F shall not be required to give his attention to the said business, nor shall interfere in the concerns thereof, but the same shall be under the exclusive direction and control of the said A B and C D, who shall devote their whole time and attention to the management thereof.

[This being an ordinary partnership as regards A B and C D, insert here the usual clauses, being Articles 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, from Precedent I.]

18. That the said A B and C D will not only furnish to the said E F a copy or transcript of such annual account as aforesaid, but will at all times during the continuance of the said E F's connection with the said business freely and unreservedly communicate and disclose to the said E F such information respecting the said business as shall enable him to form a correct opinion of the actual condition thereof.

19. That upon the determination in any manner of the connection of the said E F with the said business, the said E F, or his executors or administrators, shall in the first instance receive out of the produce of the said business, and if that shall be insufficient, then out of the capital thereof, a proportional part of the said annual allowance

or sum of £ up to the period of such determination, to be paid immediately on such determination, and the said E F, or his executors or administrators, shall also be entitled out of the capital of the said business to the full sum of £ in satisfaction of his share in the said capital and without any deduction on account of the expenses or losses which may have been incurred or shall have accrued therein; which sum of £ shall be secured to be paid to the said E F, his executors or administrators, by the joint and several bond of the said A B and C D, or the bond of such one of them as shall be then living (as the case may be), by four equal installments of three, six, nine and twelve calendar months, to be computed from the time of such determination, with interest thereon at the rate of 5*l.* per cent per annum from the time of such determination, and that if the capital of the said business shall be insufficient to pay to the said E F, his executors or administrators, the said sum of £ , then the same shall be made good by the said A B and C D, or their respective executors or administrators, in equal proportions out of their respective separate estates.

[This clause only provides for the share of E F. In regard to the mode in which the final account is to be taken and the affairs wound up as between A B and C D, the ordinary clauses apply, and may be inserted, viz.: Articles 19, 20, 21, from Precedent I.]

No. XV.

Deed of dissolution of copartnership in the trade or business of stock brokers.

This indenture made, etc., between A B, of, etc., of the one part, and C D, of, etc., and E F, of etc., of the other part. Whereas, by indenture bearing date, etc., and made between the said C D of the first part, the said A B of the second part, and the said E F of the third part, the said C D, A B, and E F covenanted with each other to be copartners in the business of stock brokers and bill or discount brokers at the Bank of England, Stock Exchange, and elsewhere, within the city of London, for the term of three years from the 25th day of March then instant, if all of them should so long live, and for such further contingent term as therein mentioned, and subject to the agreements therein mentioned, under the style of , and that the

said parties should bring into the business the sum of £ as their capital in the proportions following (that is to say), the said C D should bring in £ , the said A B £ , and the said E F £ ; and that the said capital and all the profits of the said business, and all expenses and losses attending the same, should be divided into thirty-two equal parts, of which the said C D should be entitled to have and should bear and pay nine parts, the said A B fifteen parts thereof, and the said E F the remaining eight parts; and after various stipulations with respect to the management of the said business and the divisions and funding of the clear profits of the said trade in augmentation of the capital, it is provided that the said sum of £ capital, brought in by the said parties, should be a charge upon the said copartnership estate, and the profits thereof, until the whole of the said sum of £ and all increase thereof as aforesaid, should be repaid to the parties in proportion to their respective advances; and that in the meantime it should be lawful for the said parties respectively to take out of the profits of the concern interest upon the capital brought in by each, at the rate of five per cent per annum. And whereas, by indenture of lease bearing date, etc. [recite lease of business premises to A B]. And whereas, by an agreement in writing, bearing date, etc., and made, or expressed to be made, between the said A B of the one part, and the said C D and E F of the other part, the said A B agreed to retire from the said copartnership on the 31st day of October then next, on receiving the sum of £ as a premium for his share of the good will of the concern, such sum to be secured to him by the said E F and C D, as thereinafter mentioned, and the said C D and E F agreed to pay and secure to the said A B the said sum of £ , in manner following (that is to say) the sum of £ part thereof to be paid on the said 31st day of October next, and the remainder of the said sum of £ to be paid by two equal installments of £ each, on the day of , and the day of ; such two last-mentioned installments to be secured by the joint and several bond of the said C D and E F in the penalty of £ , but such installments not to bear interest, and the said A B did thereby agree with the said C D and E F, that he, the said A B, would on the said day of , upon receiving payment of the sum of £ , and on receiving the said joint and several bond of the said C D and E F for securing the said sum of £ , payable by installments as aforesaid, assign unto the said C D and E F all the good-will, future benefit, and advantage of him the said A B, of and

in the said copartnership business, and all profits thenceforth to arise therefrom, and all his estate and interest in the house in which the said copartnership business was then carried on, and in the lease then held by him thereof, and the said parties did thereby agree, that upon such payment of the said sum of £ being made and security given for the said sum of £ , the said copartnership should be finally dissolved as on and from the said day of , by notice in the Gazette as to the said A B and a proper deed of dissolution signed and executed between the parties, and it was also agreed that the free use and exercise of a right to carry on the business of a stock broker and exchequer bill broker and jobber, as theretofore carried on by the said parties, should be reserved to the said A B. And whereas the said parties hereto have made up, adjusted, and settled the accounts of the said copartnership up to and inclusive of the day of the date of these presents, and there having appeared upon the final balance of such accounts to be due and owing to the said A B, in respect of capital advanced by him pursuant to the said articles of partnership and interest thereon, and for his share of the profits of the said copartnership, the sum of £ the said sum of £ hath accordingly been drawn out of the funds of the said copartnership by the said A B, on the day of the date hereof, as he, the said A B, doth hereby admit and acknowledge. And whereas the said C D and E F have in further pursuance of the said recited agreement executed and given to the said A B, their joint and several bond bearing even date herewith in the penal sum of £ , conditioned for securing the payment to the said A B, his executors, administrators, and assigns of the sum of £ , by two equal installments on the day of and the day of , without interest. And whereas the said parties hereto, in further pursuance of the said agreement, have this day signed an advertisement or notice of the dissolution of the said copartnership as to the said A B, and an authority for inserting the same in the London Gazette: Now this indenture witnesseth, that in further pursuance and performance of the said agreement, they, the said C D, A B, and E F, with the mutual assent of each other, do by these presents, as from the day of instant, determine and dissolve the said copartnership carried on by them as aforesaid, so far as relates to or concerns the said A B. And this indenture also witnesseth, that in further pursuance and performance of the said recited agreement on the part of the said A B, and in consideration of the sum of £ , of lawful money of Great Britain, to the said A B,

paid by the said C D and E F upon or immediately before the execution hereof, the receipt of which said sum of he, the said A B, doth hereby acknowledge, and of and from the same doth hereby release the said C D and E F, and each of them, their and each of their heirs, executors, and administrators, and in consideration of the said bond given by the said C D and E F to the said A B as aforesaid (the receipt of which said bond the said A B doth hereby acknowledge), he, the said A B, doth by these presents grant, assign and transfer unto the said C D and E F, their executors, administrators, and assigns, all, etc. (the household premises), and also all these fifteen full and equal thirty-two parts, and all other part, share, right, and interest of him, the said A B, of, in, and to all the capital, stock, debts, moneys, books of account, vouchers, securities, effects, matters and things due, owing, or belonging to the said copartnership, or to the said parties hereto respectively on account thereof, and all future gains and profits thereof, and of, in, and to the good-will, benefit, and advantage of the said business of a bill broker, and discount broker, and stock broker, and all other business connected therewith carried on by the said copartnership (save and except the right hereinafter reserved to the said A B to carry on the business of a stock broker and exchequer bill broker and jobber, on his own account), and all the estate, right, title, and interest, claim and demand whatsoever, at law and in equity of him, the said A B, of, in, to, or out of the said several premises; to have and to hold the said leasehold premises hereinbefore expressed and intended to be hereby assigned, with the appurtenances, unto the said C D and E F, their executors, administrators and assigns, henceforth, for and during the unexpired residue and remainder of the said term of years thereof granted as aforesaid, and for and during all other the estate, term, and interest of the said A B in or to the same, subject, nevertheless, to the payment of the rent and performance of the covenants and agreements in the said indenture of lease reserved and contained, and henceforth on the lessees, or assignees, part to be paid and performed; and to have, hold, and take the said parts of capital, debts, effects, good-will, and all and singular other the premises hereby assigned, except the said leasehold premises, unto the said C D and E F, their executors, administrators, or assigns, for their absolute exclusive use and benefit. And for better enabling them, the said C D and E F, their executors, administrators, or assigns, to have, receive, get in, and recover all and singular the

said copartnership debts, effects, and premises, to and for their own use and benefit, he, the said A B, doth hereby irrevocably appoint and in his place and stead put the said C D and E F and the survivor of them, his executors, administrators, and assigns, as his true and lawful attorneys and attorney, to ask, demand, sue for, recover, and receive to and for their own respective use and benefit all and every the debts, estate, and effects due, owing, or belonging to the said hereby dissolved copartnership, and all other the premises, the shares, rights, and interests therein of the said A B so hereby assigned as aforesaid, of and from all and every person or persons whomsoever liable to answer and pay the same, and in case of non-payment or non-delivery thereof, or of any part thereof, then at the proper costs and charges of the said C D and E F, their executors, administrators, and assigns, and in the joint names of the said A B, C D, and E F, or in the name or names of any of them, or otherwise, to commence, bring, and prosecute any actions, suits, or proceedings at law or in equity for the recovery thereof, and the same from time to time to discontinue at pleasure, or upon the receipt or delivery thereof, or of any part thereof, to give and sign acquittances or other discharges for the same, and finally to make, do, or execute all and every such further or other lawful acts, matters, and things as may be thought necessary for the recovering, receiving, or compounding, acquitting, and discharging the premises. And for all or any of the purposes aforesaid from time to time to appoint one or more attorney or attorneys, agent or agents, and at pleasure to revoke or alter such appointment. And for all or any of the purposes aforesaid to use the name or names of the said A B, his executors or administrators, he, the said A B, hereby agreeing to allow, ratify, and confirm all whatsoever they or either or any of them shall lawfully do or cause to be done in or about the premises. And the said A B, for himself, his heirs, executors, and administrators, doth covenant with the said C D and E F, their executors, administrators, and assigns, that he, the said A B, hath not at any time heretofore made, done, executed, committed, permitted, or suffered to be made or done any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the said leasehold premises, or the term of years thereof, granted as aforesaid, are or is, can, shall, or may be assigned, charged, affected, or incumbered in any wise howsoever or whereby the debts appearing in the books of the copartnership, or any of them, are released or extinguished, or the said capital stock, debts, effects, and premises of

or belonging, due, or owing to the said joint trade, or any of them, or any part thereof, or the said partners are, or is, or can, shall, or may be charged, affected, or incumbered except as appears by the books of the said partnership, or as is now made known to the said parties. And also that he, the said A B, his executors or administrators, shall not, nor will at any time hereafter apply for, obtain, receive, or take any of the stock, debts, books of account, vouchers, effects and premises belonging to the said partnership, nor release, compound, give up or discharge any debts or effects of the partnership, or any suit, action or proceeding to be brought, commenced or instituted for the recovery thereof, without the consent and direction in writing of the said C D and E F, their executors, or administrators, or assigns, or do, or authorize to be done, any act, deed, matter or thing whatsoever, whereby, or by reason or means whereof, they, the said C D and E F, their executors, administrators, or assigns, or any of them, can, shall, or may be prevented or obstructed from receiving, recovering, and getting all or any of the said stock, debts, effects, and premises whereof the share and interest of the said A B is hereby assigned, nor revoke or make void the power hereby to them granted for that purpose. But that on the contrary, he, the said A B, shall and will from time to time, during the space of two calendar months now next ensuing, upon the request of the said C D and E F, their executors or administrators, afford his advice or assistance in procuring the liquidation of the accounts and concerns of the said late copartnership. And also that he, the said A B, his executors or administrators, shall and will at any time or times hereafter, at the request, costs, and charges of the said C D and E F, their executors, administrators, and assigns, make, do, perform, and execute all such acts, deeds, assignments, matters, and things whatsoever, for further and more effectually assigning and assuring the said several premises hereinbefore expressed to be assigned unto the said C D and E F, their executors, administrators and assigns, in manner aforesaid, and for facilitating the receipt and recovery of the said debts and effects, as by the said C D and E F, their executors, administrators, and assigns, or their said counsel in the law, shall be reasonably advised and required. And the said C D and E F do hereby for themselves, their heirs, executors, and administrators, and each of them doth hereby for himself, his heirs, executors, and administrators, covenant with the said A B, his executors and administrators, that they, the said C D and E F, or one of them, their or one of their heirs, executors, or

administrators, will with all convenient speed well and truly pay, or cause to be paid, all the debts owing from or by the said late copartnership, or all or any of them the said parties hereto in respect thereof, and which appear in the books or accounts of the said late copartnership, and fulfill and perform all other the engagements whatsoever of the said late copartnership, or to which the said parties or their respective heirs, executors, or administrators, or any of them are, is or shall be liable on account of the said copartnership; and shall and will save, defend, keep harmless, and indemnify the said A B, his heirs, executors, and administrators, and his and their estates and effects of, from, and against all losses, damages, costs, charges and expenses whatsoever, which shall or may or otherwise might be sustained or incurred or become payable for, or by reason or means of the non-payment or non-performance of any of the said debts or engagements, or in anywise relating thereto, or for or by reason of any action or suit, or actions or suits, or other proceeding or proceedings, which shall or may be brought or prosecuted or used by virtue of or under any power or authority hereby given or in pursuance hereof to be given to the said C D and E F, or either of them, their executors, administrators, or assigns, or their or any of their substitute or substitutes. And this indenture also witnesseth, that in pursuance of the said agreement, they, the said C D and E F, do and each of them doth by these presents acquit, release, and discharge the said A B, his heirs, executors, and administrators, and the said A B doth by these presents acquit, release, and discharge the said C D and E F, and each of them, their and each of their heirs, executors, administrators, and assigns, of and from all actions, suits, accounts, reckonings, claims, and demands whatsoever, either at law or in equity, for or by reason or on account of the said articles of copartnership of the day of , or any clause, covenant, matter, or thing therein contained, or for or by reason of any act, deed, matter, or thing whatsoever, in anywise relating to the said copartnership or to the premises; saving always out of this release the said bond of even date herewith, and all claims and demands of the said A B in respect thereof. In witness, etc.

No. XVI.

Deed of Dissolution.

This indenture, etc., between A, of, etc., of the one part, and B, of, etc., of the other part. (Recite articles of partnership between A and B for a term of years — the joint trading — an agreement between them that A shall retire, and B go on with the trade — that the accounts of the partnership have been taken, and that £ are due to A on the balance of the account — and that the parties have agreed to enter into the following deed for more effectually dissolving the partnership, for assigning A's share to B, and for indemnifying A from the debts of the concern, etc. Then proceed.) Now this indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the sum of £ of lawful English money to the said B in hand, etc., each of them, the said A and B, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree with and to the other of them, his heirs, executors, and administrators, that the said copartnership or joint trade, and every part and branch thereof, and also the said indenture of the day of , and every covenant, matter, and thing therein contained, shall, from the day of last, be void and absolutely dissolved, any thing in the said recited indenture of copartnership contained to the contrary in anywise notwithstanding. And the said A, in pursuance of the said agreement, and for the considerations aforesaid, hath bargained, sold, and assigned, and by these presents doth bargain, sell, and assign unto the said B, his executors, administrators, and assigns, all that the said part, share, and interest of him, the said A, of and in the said joint trade, and of all goods, wares, merchandises, moneys, debts, and effects thereto belonging, or in or to which the said A has any right, title, or interest jointly with the said B, by virtue of the said copartnership; and all the right, title, interest, claim, and demand whatsoever, of him, the said A, of, in, and to the said capital, joint stock, effects, money, and debts, and every or any part thereof; and all the profits, produce, gains, and proceeds thereof; to have, hold, receive, and enjoy the said part, share, and interest, and all other the share and interest of him, the said A, of, in, and to the said capital, joint stock, and all and singular other the premises hereby assigned, or intended so to be, and every part and parcel thereof, unto the said B, his executors, administrators,

and assigns, to and for his and their own proper use and benefit: And the better to enable the said B, his executors and administrators, to receive all the said partnership debts and effects to and for his and their own use and benefit, he, the said A, hath made, constituted, and appointed, and by these presents doth make, constitute, and appoint the said B, his executors and administrators, his true and lawful attorney and attorneys, to ask, demand, sue for, recover, and receive of and from all and every person and persons whatsoever, all and every the debts, sum and sums of money, goods, chattels, and effects whatsoever, now due and owing, or belonging to the said copartnership, and, upon receipt of the same, or any and every of them, to give, sign, and execute proper and sufficient releases, acquittances, and discharges for the same; and also to state and settle all accounts and differences in any way relating to the said joint trade, with all and every person and persons whatsoever, and to compound and release all and every or any part of the said debts and demands, as he and they shall think fit and necessary; and to do all and every other act, matter, and thing whatsoever, in and about the premises, in the name of him, the said A, and as fully and effectually to all intents and purposes as he, the said A, could or might do if personally present. And the said A doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said B, his executors, administrators, and assigns, that he, the said A, his executors, administrators, or assigns, shall not, nor will at any time or times hereafter, receive, release, acquit, or discharge any of the debts or demands due to the said copartnership, or any actions or suits that shall be brought, sued, or commenced for or on account of the same, without the consent of the said B, for that purpose in writing first had and obtained: Nor shall nor will do, or suffer or cause to be done, any act, matter, or thing whatsoever, whereby the said B, his executors, administrators, or assigns, shall or may be hindered or obstructed in the recovering and receiving of the said debts, goods, chattels, and effects due, owing, and belonging to the said copartnership, or any part thereof; but shall and will, from time to time, and at all times hereafter, at the cost and charge of the said B, do and execute all and every further and other lawful matters and things, for the better enabling him, the said B, his executors, administrators, or assigns, to get in and receive the same, to and for his and their own use and benefit as aforesaid: And each of them, the said A and B, doth hereby, for himself, his heirs, executors, and administra-

tors, remise, release, and forever quit claim unto the other of them, his heirs, executors, and administrators, all and all manner of actions, suits, claims, and demands whatsoever, both at law and in equity, which either of them, the said parties, his heirs, executors, administrators, or assigns, now hath or can or may at any time or times hereafter have, claim, challenge, or demand against the other of them, his heirs, executors, or administrators, for or by reason or means of the said copartnership, or of the said indenture of copartnership, or any other matter, cause, or thing whatsoever relating thereto: And the said B doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said A, his executors and administrators, in manner following (that is to say), that he, the said B, his executors and administrators, shall and will, as soon as conveniently may be, pay and discharge all debts and demands whatsoever, due and owing from the said A and B on account of the said copartnership, or which he, the said A, his executors or administrators, shall or may be liable to pay, satisfy, or make good, jointly with the said B, for or by reason or means of the said copartnership: And also shall and will, from time to time, and at all times hereafter, well and sufficiently save, keep harmless, and indemnify the said A, his heirs, executors, and administrators, and his and their, and every of their estate, goods, chattels, and effects, of, from, and against all costs, payments, charges, demands, and expenses whatsoever, which he, the said A, his heirs, executors, or administrators, or his or their estate, goods, chattels, or effects, shall or may suffer, sustain, or be put unto, for or by reason of the said copartnership, or by reason of the said B, his executors or administrators, making use of the name of the said A, in any suit or action for the recovery of the said copartnership debts and effects, or by reason or means of his being made defendant in any suits, or any other matter or thing whatsoever, relating to the said copartnership. In witness, etc.

No. XVII.

Deed of Settlement by the "London —— Ale Brewing Company."

This indenture, made the day of , in the year of our Lord, etc., between John Styles, of, etc., of the first part; the several persons whose names are subscribed hereunto, and whose seals are

hereunto affixed, of the second part; L, M, and N (three of the proposed trustees), of the third part; and O (the other of the proposed trustees), of the fourth part. Whereas at divers meetings heretofore had and holden by and between the several persons parties hereto, and others, proposals were mutually made and adopted by the parties hereto, for establishing a company for supplying the city of London, and the community at large, with pure and unadulterated ale and table beer, to be procured upon or by the application and adoption of the principles of the system of brewing, and it has been agreed among the said parties that they, together with such others as might join therein, in manner hereinafter mentioned, should form and associate themselves into a copartnership society or company under the title or denomination of the London Ale Brewing Company: And whereas, in contemplation of the proposed establishment, and with a view to promote its objects, certain expenses have been incurred by the persons hereinafter appointed directors of the said company, and particularly in the purchase of the lease, and in the fitting up of a house and premises convenient for carrying on the concerns of the said company, and it was agreed that such expenses should be paid out of the funds of the said company when established, and that the said house and premises should form and be considered part of the property of the said company, and be held in trust for the company in manner as hereinafter mentioned. And whereas the same house and premises were, by a certain indenture, bearing date on or about the day of last, and made or expressed to be made between L, of, etc., of the one part, and the said John Styles of the other part, in consideration of £ , and of the rent and covenants therein mentioned and contained, demised for a term of years, commencing from the date thereof, unto the said John Styles, his executors, administrators, and assigns, but in trust only for the benefit of the said company; and it was, previous to the execution of such indenture, agreed that the said John Styles should enter into the declaration of trust thereof hereinafter contained; and whereas it has been agreed, for giving effect to the said proposals and agreements, and for the establishment of the said company, that the present deed shall be executed, and that the concerns of the said company shall be carried on and conducted under the superintendence and control of such officers and agents, and subject to such declarations, rules, regulations, restrictions, conditions, and provisions as in and by these presents are declared and contained: Now this indenture witnesseth, that, in pur-

tors, remise, release, and forever quit claim unto the other of them, his heirs, executors, and administrators, all and all manner of actions, suits, claims, and demands whatsoever, both at law and in equity, which either of them, the said parties, his heirs, executors, administrators, or assigns, now hath or can or may at any time or times hereafter have, claim, challenge, or demand against the other of them, his heirs, executors, or administrators, for or by reason or means of the said copartnership, or of the said indenture of copartnership, or any other matter, cause, or thing whatsoever relating thereto: And the said B doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said A, his executors and administrators, in manner following (that is to say), that he, the said B, his executors and administrators, shall and will, as soon as conveniently may be, pay and discharge all debts and demands whatsoever, due and owing from the said A and B on account of the said copartnership, or which he, the said A, his executors or administrators, shall or may be liable to pay, satisfy, or make good, jointly with the said B, for or by reason or means of the said copartnership: And also shall and will, from time to time, and at all times hereafter, well and sufficiently save, keep harmless, and indemnify the said A, his heirs, executors, and administrators, and his and their, and every of their estate, goods, chattels, and effects, of, from, and against all costs, payments, charges, demands, and expenses whatsoever, which he, the said A, his heirs, executors, or administrators, or his or their estate, goods, chattels, or effects, shall or may suffer, sustain, or be put unto, for or by reason of the said copartnership, or by reason of the said B, his executors or administrators, making use of the name of the said A, in any suit or action for the recovery of the said copartnership debts and effects, or by reason or means of his being made defendant in any suits, or any other matter or thing whatsoever, relating to the said copartnership. In witness, etc.

No. XVII.

Deed of Settlement by the "London —— Ale Brewing Company."

This indenture, made the day of , in the year of our Lord, etc., between John Styles, of, etc., of the first part; the several persons whose names are subscribed hereunto, and whose seals are

hereunto affixed, of the second part; L, M, and N (three of the proposed trustees), of the third part; and O (the other of the proposed trustees), of the fourth part. Whereas at divers meetings heretofore had and holden by and between the several persons parties hereto, and others, proposals were mutually made and adopted by the parties hereto, for establishing a company for supplying the city of London, and the community at large, with pure and unadulterated ale and table beer, to be procured upon or by the application and adoption of the principles of the system of brewing, and it has been agreed among the said parties that they, together with such others as might join therein, in manner hereinafter mentioned, should form and associate themselves into a copartnership society or company under the title or denomination of the London Ale Brewing Company: And whereas, in contemplation of the proposed establishment, and with a view to promote its objects, certain expenses have been incurred by the persons hereinafter appointed directors of the said company, and particularly in the purchase of the lease, and in the fitting up of a house and premises convenient for carrying on the concerns of the said company, and it was agreed that such expenses should be paid out of the funds of the said company when established, and that the said house and premises should form and be considered part of the property of the said company, and be held in trust for the company in manner as hereinafter mentioned. And whereas the same house and premises were, by a certain indenture, bearing date on or about the day of last, and made or expressed to be made between L, of, etc., of the one part, and the said John Styles of the other part, in consideration of £ , and of the rent and covenants therein mentioned and contained, demised for a term of years, commencing from the date thereof, unto the said John Styles, his executors, administrators, and assigns, but in trust only for the benefit of the said company; and it was, previous to the execution of such indenture, agreed that the said John Styles should enter into the declaration of trust thereof hereinafter contained; and whereas it has been agreed, for giving effect to the said proposals and agreements, and for the establishment of the said company, that the present deed shall be executed, and that the concerns of the said company shall be carried on and conducted under the superintendence and control of such officers and agents, and subject to such declarations, rules, regulations, restrictions, conditions, and provisions as in and by these presents are declared and contained: Now this indenture witnesseth, that, in pur-

suance of the said recited agreements, he, the said John Styles, doth hereby acknowledge and declare that his name was made use of in the said indenture of trust only for the benefit of the said company when established, and, for himself, his executors, and administrators, doth hereby renounce and disclaim all manner of beneficial estate, title, or interest in the house and premises so assigned or assured to him by the said indenture of the day of , or in the term of years thereby created otherwise than and in trust only for the said company and the respective members thereof, their executors, administrators, and assigns, subject to these presents, and the true intent and meaning thereof; and he, the said John Styles, for himself, his heirs, executors, and administrators, doth hereby covenant, agree, and declare with and to the said , and the trustees for the said company for the time being, that he the said John Styles, his executors, administrators, and assigns, shall and will stand and be possessed of and interested in all and singular the said house and premises, and the issues, proceeds, and profits thereof, in trust only for the said company, and shall and will, whenever required in manner hereinafter mentioned, and on being properly indemnified therefor, and at the costs of the said company, assign or otherwise assure the same house and premises, and the issues, proceeds, and profits thereof, upon such trusts and for such ends, intents, and purposes, as the said company or its authorized officers or agents for the time being shall direct or appoint; and that free and clear of all charges and incumbrances, made, created, or knowingly suffered by him the said John Styles, his executors or administrators, or any person claiming or having title to claim under him, them, or any or either of them. And this indenture further witnesseth, that, in pursuance and performance of the said recited agreements and proposals, and for the purposes hereinbefore mentioned, and other the ends, intents, and purposes hereinafter expressed, they and each of them the parties whose names and seals are hereunto respectively set and affixed (save only the parties hereto of the third part) for themselves and himself severally and respectively, and their and his several and respective heirs, executors, and administrators, and as to and for their and his own proper and respective acts and deeds, but not all or any of them jointly, nor any one or more of them for the other or others of them, or for their heirs, executors, or administrators, or the acts or deeds of the other or others of them, do and doth covenant, promise, declare, and agree with and to the said parties hereto of the third part, their executors and admin-

istrators; and they the said parties hereto of the third part, for themselves and himself severally, etc., do and doth covenant, promise, declare, and agree with and to him the said party hereto of the fourth part, and his executors and administrators, in manner following (that is to say), that they the several persons and parties hereinbefore mentioned, and the several other persons who shall hereafter be and become parties hereto, or members or partners in the said company, shall and will be, remain, and continue connected and associated together and firmly bound unto each other in copartnership, for supplying London and the community at large with pure and unadulterated ale and table beer to be brewed or procured upon and by the application and adoption of the principles of the system of brewing, under the firm, title, or denomination of "The London Ale Brewing Company," for or during the term or period, and subject to and under the rules, regulations, restrictions, conditions, covenants, provisions, clauses, and agreements, hereinafter, or to be hereafter agreed upon and established in manner hereinafter provided in that behalf.

1. That the business and concerns of the said company shall, for the present, be carried on and conducted at street aforesaid, and shall continue to be there carried on and conducted until some other place or places shall hereafter have been selected and agreed upon, in manner and by virtue of the powers and authority hereinafter contained, for the space of ten years, unless the company shall be dissolved, in manner hereinafter mentioned.

2. That the capital stock or fund of the company shall, for the present, consist of the sum of 500*l.*; which may, nevertheless, be increased in manner hereinafter mentioned.

3. That the said capital of 500*l.* shall be divided in fifty shares of 10*l.* each share, and that no person shall subscribe for less than one share, nor more than five shares; the several shares, as subscribed for, to be numbered progressively, and thereafter identically distinguished by such number, in manner hereinafter more particularly mentioned.

4. That the sum of 3*l.* per share shall be paid by way of advance or deposit on each of the said shares, at or before signing these presents; and the directors hereinafter named, or the directors for the time being of the company, shall have the power and absolute discretion to call in or require payment of the remaining 7*l.* on each share, or such parts thereof from time to time, and at such times, until the whole

10*l.* shall have been called in and paid, as they may deem expedient, by giving such notice of any such call as hereinafter mentioned.

5. That every of the parties hereto respectively shall and will pay or cause to be paid into the hands of the bankers of the company, to be chosen as hereinafter mentioned, all such sums, by way of installment on his or her shares, as he or she shall or may be, from time to time, called upon or required to pay by virtue of these presents, at the time and times they may respectively be called on or required to pay the same.

6. That the capital stock of the said company may at any time or times, and from time to time, be increased beyond and above the amount of 500*l.*, if the major part of the proprietors, at any general meeting, to be held as hereinafter mentioned, shall think fit, and be raised by the issues of fresh shares of 10*l.* each, and the admission of new subscribers, who shall thenceforth be considered and be proprietors or shareholders, and entitled to exercise and enjoy the same rights, privileges, and advantages, and be subject to the same liabilities, as if such additional capital had formed the original capital of the said concern, and such new proprietors had been originally parties to these presents.

7. That no member of the company shall hold or possess more than five shares in the capital stock thereof, unless the same, or the additional number thereof, shall have come or accrued to him, her, or them by marriage, or as legatee, executor, administrator, next of kin, or other lawful representative of a deceased proprietor; and if his or her number of shares shall exceed the number of five by any other means than last aforesaid, the excess of shares shall be forfeited and sink into the capital stock of the company, for the general benefit of the proprietors.

8. That the general management of the concerns of the company shall (subject to the clauses, conditions, provisions, and restrictions hereafter expressed) be intrusted to persons who shall constitute a board of directors; and the following persons shall be the first and present board of directors—that is to say, A, B, C, etc., of whom the said shall be chairman, and the said deputy chairman, for the time being of the said board; and that the following persons shall be the first and present officers of the company, that is to say, the said shall be the trustees, the said shall be the manager, the said shall be the auditors, Messrs. the bankers.

9. That the affairs and concerns of the company shall be conducted and managed under and subject to the several rules, regulations, clauses, and agreements hereinafter contained, that is to say—

10. That the proprietors of the company shall assemble together at the offices of the company at , or in some other convenient place in London, twice in every

11. That every such assembly of the proprietors shall be styled a general meeting; and such general meeting shall have full power to superintend, regulate, and control all the affairs of the company, the sense of such meeting being first taken in manner hereinafter mentioned.

12. That the half-yearly general meeting shall be held on the first Wednesday in the months of , and held on the day of in every year, and shall be convened by the board of directors in the manner hereinafter mentioned.

13. That an extraordinary general meeting may be called at any time by any six proprietors or more, each of whom shall be a holder, in his own right, of not less than three shares in the capital of the company, and each of whom (the present proprietors excepted) shall have been a proprietor of the company for at least six months, sending a written requisition under their hands to that effect to the board of directors, who shall thereupon call such extraordinary meeting: Provided that the requisition of such proprietors be left at the office of the company at least fifteen days before the time named in the requisition for holding the same: And provided that in every such requisition the object for which the extraordinary general meeting is required to be called, shall be fully expressed, and the day and hour specified for holding the same, otherwise it shall not be incumbent on the board of directors to take notice of the same.

14. That if, after any such requisition to the board of directors shall have been left at the office of the company, the said directors shall refuse or neglect to call such extraordinary meeting, then the proprietors signing the requisition may advertise an extraordinary general meeting in any two London newspapers, not less than fourteen, nor more than twenty-one days before the time fixed for holding the same, specifying the time and place of meeting, and the nature of the business transacted.

15. That both a half-yearly and an extraordinary general meeting may, in the cases hereinafter mentioned, adjourn to a future day; but no adjourned general meeting shall, except in the cases hereinafter

specified, be held until the same be duly called in the manner hereinafter mentioned.

16. That no other business shall be transacted at an extraordinary general meeting besides the business for which it shall have been called; and no other business shall be transacted at an adjourned general meeting besides the business left unfinished at the general meeting, for which such adjournment took place.

17. That, upon any difference of opinion at any general meeting, concerning any matter or thing that may be lawfully transacted or agitated at the , any ten proprietors or more who shall be present at the meeting, and qualified to vote as hereinafter mentioned, and each of whom shall be a holder, in his own right, of not less than three shares in the capital of the company, may demand a ballot if they think proper; and the same, if demanded at the meeting by writing under their hands, but not otherwise, shall be granted, and such a day for taking the same shall be fixed by the chairman as will allow sufficient time for giving notice thereof in the manner hereinafter mentioned; and every ballot shall commence at twelve o'clock at noon, and shall be kept open six hours, and no longer.

18. That only those proprietors present at any general meeting or ballot shall be considered qualified proprietors, and entitled to vote at that meeting or ballot, who (the present proprietors excepted) shall have been proprietors of the company for three calendar months next preceding the time at which such general meeting or ballot shall be held.

19. That at every general meeting and ballot every qualified proprietor shall have and be entitled to one vote for every share or shares, not exceeding five shares, which he, she, or they shall or may possess; but no member shall be entitled to more than five votes in respect of any shares he may so hold in the said company.

20. That every proprietor qualified to vote at the general meetings and at ballots shall be entitled to appoint a person to vote and act for him or her by proxy, either at a given or an indefinite number of general meetings or ballots; but no vote or act by proxy, at any general meeting or ballot, shall be admitted, unless the person appointed to vote and act by proxy shall be a qualified proprietor, and shall be nominated in writing under the hand of the qualified proprietor availing himself or herself of his or her right so to vote and act by proxy, and unless such appointment shall have been entered in the books of the company; and no such qualified proprietor shall carry

more than five proxies; and every proxy shall continue in force for the period to which the same was originally intended to extend, unless or until revoked by writing under the hand of the proprietor giving the same, and until notice of such revocation shall be given at the office of the company.

21. That every proprietor who shall have appointed such proxy as aforesaid shall, for all the purposes of the general meeting or meetings, or of the ballot or ballots for which the proxy shall have been appointed, but not for the purpose of composing the number of proprietors whose personal presence is requisite to prevent adjournment, be considered present by such proxy; and all the votes and acts of the proxy in that capacity shall be as valid and effectual as the votes and acts of the proprietor appointing him would have been if such proprietor had been present and personally voted and acted at any such general meeting or ballot.

22. That two-thirds of the qualified proprietors present at two successive extraordinary general meetings specially called for the purpose, at the ballot or ballots which may be taken in consequence of being demanded at such meetings, or either of them, shall be requisite to make new laws, regulations, and provisions for the company, to amend, alter, or repeal all or any of the existing laws, regulations, and provisions of the company, or to dissolve the company.

23. That, as to all questions relating to any other business or matter to be transacted or agitated at any general meeting, a majority of the votes of all the qualified proprietors present and not declining to vote at the meeting, or at any ballot which may be taken in consequence of being demanded after such meeting, shall be sufficient to decide the same.

24. That the person to be in the chair at every general meeting shall be the chairman of the company; and, in case he should be absent, the deputy chairman of the company; and, in case both the chairman and deputy chairman should be absent, then some one of the directors present, to be elected by ballot, if need be, at the meeting; but, in the absence of all those, no business, except the adjournment of the meeting, shall be proceeded in.

25. That the minutes of the proceedings of every meeting, general or special, ordinary or extraordinary, shall be entered and kept in proper books kept for such purpose, and signed by the person in the chair for the time.

26. That an extraordinary general meeting, specially called for the purpose, may remove from his office any director, auditor, manager, or trustee, for negligence or misconduct in office, or any other reasonable cause, the sense of the meeting being taken by ballot, as hereinafter mentioned.

27. That two successive extraordinary general meetings, specially called for the purpose, shall have full power to make any new laws, regulations, and provisions for the company, or to amend, alter, or repeal, either wholly or in part, all or any of the existing laws, provisions, and regulations of the company, provided such new, amended, or altered laws, regulations, and provisions do not extend to amend, alter, or repeal all or any part of the laws, regulations, and provisions established and settled by these presents, for confining the individual responsibility of each proprietor of the company to the amount of his or her share or shares in the capital thereof.

28. That any general meeting shall adjourn to a future day, if five of the proprietors and one or more of the directors shall not be present at the time appointed for such meeting, and proceed to business, within one hour from the time fixed for the meeting, and may adjourn to a future day, if the number of proprietors aforesaid and a director shall not be personally present when the whole or any part of the business to be transacted shall be decided upon; and may also adjourn to a future day if the meeting shall, by ballot, determine to break up before the whole of the business shall be completed; but, if any general meeting shall be adjourned, from any other cause than those aforesaid, the adjourned meeting may be held either from time to time, or from day to day, or at such other time or times, and in such manner as the proprietors present at the original meeting, or at any adjournment thereof, shall think proper.

29. That, whenever a general meeting shall, in consequence of a deficiency in the number of proprietors and a director, or from their or his absence during the time of transacting the business of the meeting, have adjourned to a future day, the board of directors shall call the adjourned general meeting, by advertising the same in any two or more London daily newspapers at least seven days and not more than twenty-one days before the time for holding the same, and in the advertisement the object of the adjourned general meeting and the hour and place of meeting shall be specified.

30. That the directors shall meet together at the house or office of the company in aforesaid, once in every month at least, and at

such other times as they shall be convened in the manner hereinafter mentioned.

31. That every such meeting shall be styled a board of directors.

32. That any one director may require the manager of the company to call an extraordinary board of directors; and such manager shall call the same, by sending to each of the directors, at least six days before the day appointed for the meeting, a circular letter signed by him, mentioning the day and hour of the meeting, and the purpose for which the same is required to be held.

33. That no business shall be transacted at a board of directors, unless the directors be present at the commencement of the business, and when a decision takes place upon the whole or any part of the business.

34. That no business shall be transacted at an extraordinary board, unless five directors be present at the commencement of the business, and when a decision takes place upon the whole or any part of the business.

35. That neither the directors nor any other officers of the company shall monopolize, forestall, regrate, or engross, or cause to be monopolized, forestalled, regrated, or engrossed, any malt, hops, beer, or any other articles or commodities used in carrying into effect the object of the company, but purchase and procure the same from time to time in market overt, or otherwise in the usual way of trade and dealing, as and when the ordinary consumption of the company shall require, without occasioning any grievance, prejudice, or inconvenience to his Majesty's subjects, in their trade, commerce, or calling, contrary to the common law or statutes of this realm.

36. That no director, trustee, manager, auditor, or other officer or agent of the company shall directly or indirectly have or be in anywise beneficially interested in any contract, agreement, bargain, or transaction, by supplying any malt, hops, beer, or any other article, commodity, matter, or thing for the use of the said company; and if any such director, trustee, manager, auditor, or other officer or agent, enter into or be concerned in any such contract, agreement, bargain, or transaction, he shall thenceforth cease to act officially for the company, and shall pay such pecuniary fine, in increase of the capital of the company, as any general meeting may declare and direct, and, in default, forfeit all his shares or share and interest in the said company and capital, and be no longer a proprietor or shareholder thereof or therein.

37. That the board of directors shall cause all sales of ale and beer, and other the goods of the company, to be made for ready money, except where the same may be likely to prove injurious to the interests of the company, or shall not be practicable; but, when it shall be necessary or advisable to sell upon credit, the board of directors shall, in all practicable cases, take or receive in payment bills or promissory notes, or other good and sufficient securities.

38. That the board of directors shall cause all purchases for or on behalf of the company to be made for ready money only, and not on credit, upon any pretense or under any circumstance whatsoever.

39. That, in order as far as possible to limit the liability of individual proprietors in respect of transactions between the company and the public, beyond the amount of the share or shares of each proprietor, the board of directors shall, so far as is practicable, cause all contracts and engagements on behalf of the company to be made and entered into with an express stipulation, that each proprietor shall be liable, in respect of any contract or engagement, to the extent only of his share or shares in the concerns of the said company.

40. That, when and so often as there shall be a vacancy in the office of chairman or deputy chairman of the board of directors, the board of directors shall cause such vacancy to be filled up with all convenient speed, by the election at an extraordinary board of directors of a new chairman, or deputy chairman, from amongst the directors for the time being of the company.

41. That, when and so often as there shall be a vacancy in the office of director, manager, or trustee, the board of directors shall cause the same to be filled up with all convenient speed, by the election, at an extraordinary board of directors, of a new director, manager, or trustee.

42. That it shall be lawful for an extraordinary board of directors, specially called for the purpose, to remove from his office any director, manager, or trustee, for negligence or misconduct in office, or any other reasonable cause.

43. That the board of directors shall appoint the future bankers and solicitors of the company, and may change the present or future bankers or solicitor at their discretion.

44. That the board of directors shall make such compensation as they shall think fit and reasonable to the manager and auditors of the company, for his and their trouble in managing the affairs of the company, and auditing the reports, which, in pursuance of the direc-

tions hereinafter contained, are to be prepared by the board of directors for the half-yearly meetings.

45. That all questions relating to any business or matter to be transacted or agitated at the board of directors shall be decided by a majority of the votes of the directors present.

46. That, at the board of directors, no director shall have more than one vote, except the person in the chair, who, in addition to the privilege of voting with the other directors, shall have a casting vote on all questions where the votes shall happen to be equal.

47. That the minutes of all the proceedings at every board of directors shall be entered and kept in a book, and signed by the person in the chair.

48. That the person to be in the chair at every board of directors shall be the chairman of the board of directors; and, in case he should be absent, then the deputy chairman of the board of directors; and, in case he should be absent, then some one of the directors present, to be elected at the board.

49. That, in all other respects, the board of directors shall be regulated, and the business thereof conducted and decided upon as the directors present shall think proper, and according to the rules and orders of any preceding board of directors.

50. That the board of directors shall, so far as the same may be practicable, and except where the same is otherwise directed by these presents, cause all the funds or property of the company to be at all times vested in the trustees of the company, and for that purpose shall cause all sums which may be invested in any Parliamentary stocks or public funds of Great Britain to be invested in the names of the trustees for the time being of the company.

51. That the said board of directors shall, as soon as conveniently may be, procure, or cause to be procured, a proper license or licenses for the sale of ale and beer of the company by wholesale and retail; and that such license or licenses shall be taken and made out in the name of the said John Styles, and be held and employed by him as manager of the company, in trust for the general benefit of the company, and for the purpose of enabling the objects of the company to be carried into effect.

52. That the said John Styles, as manager, shall continue to have vested in him, in trust, for the benefit of the company, the legal possession and ownership of the aforesaid house and premises, and the said license or licenses, and that he will do no act to forfeit any

license or licenses, or to assign or otherwise incumber the said house and premises, except under a request in writing, under the hands of the board of directors; and that, on his retirement or dismissal as manager of the company, all future license or licenses shall be taken and be made out in the name of the manager for the time being, and the said house and premises shall be assigned to such new manager, at and in such time and manner as the said board of directors shall in writing under their hands direct.

53. That the said John Styles, or other the manager of the company for the time being, shall act to the best of his ability in forwarding the object of the company, and shall, at all times during the continuance of his management, devote his whole time and attention in the usual hours of business, and use his utmost endeavors in carrying on the company's trade according to the true intent and meaning of these presents.

54. That the said John Styles, or other the manager for the time being (subject to the control of the board of directors, and other provisions herein contained), make purchases for and on behalf of the company, of malt, hops, beer, and such other commodities, matters, and things, as may be necessary for carrying into effect the objects of the company, and shall make sales of the ale and beer made by or on behalf of the said company; and, for the purpose of carrying on the trade for the benefit of the company, shall have placed at his disposal, in the hands of the bankers of the company, the fund called the management fund, hereinafter mentioned. Provided always, that no purchase to be made by virtue of the power hereby given to any one person, or any one firm, shall exceed in value or amount the sum of £ , unless such goods shall be fully paid for on delivery, or unless such sales shall be allowed to be effected by express permission of a board of directors specially convened for that purpose, and given in writing under their hands.

55. That all purchases to be made by the said John Styles, or other the manager for the time being, on behalf of the company, shall be for ready money only, and no credit taken by him so as to bind the said company on any pretense whatever; and all payments exceeding 5*l.* in amount shall be discharged by drafts or checks drawn by the said manager on the bankers of the company, to be signed by the said John Styles, or manager for the time being, upon, and payable out of the said management fund. Provided always, that no draft or check, or number of drafts or checks, in aggregate amount shall exceed the

sum hereinbefore directed to be placed under the control of the said manager in the management fund.

56. That the receipts of the said John Styles, or other the manager for the time being, shall be good and effectual discharges for all sums of money in such receipts purporting to be received by him for or on account of the company.

57. That, in the event of credit being given to any person or persons for goods and effects of the said company sold and delivered to them by the said John Styles, or other the manager for the time being, the said manager shall not, on any account whatsoever, during the continuance of the said company, release any debt or demand due or belonging to the said company, or accept for the same less than shall be really due, the usual abatement and allowance according to the custom of trade only excepted; nor shall or will release or discontinue any action or suit to be brought for any such debt or demand, without the consent in either case of the other of them, on pain of being compelled to make good, out of his share of and in the said joint stock, and the profits thereof, the amount or value of the loss occasioned thereby.

58. That the said John Styles shall not, during the continuance of the said company, directly or indirectly be concerned in or follow the business of a brewer, or any other trade, art, business, or employment whatsoever, either alone, or in company with, or as agent to, or in the name or names of any other person or persons.

59. That the said John Styles, and other the manager for the time being, shall submit to the general board of directors, full, true, and particular accounts of all purchases and sales, and payments made, and credits given, for or on account of the said company.

60. That, except the said house and premises, and license or licenses, and moneys, from time to time placed under the control of the said manager, all property to which the company may be or become entitled, shall be and be deemed the property at law of the trustees for the time being of the company, and be treated and considered as such in all criminal and civil proceedings at law, and not as the property of the proprietors for the time being of the company; and all such personal estate to which the company may be entitled shall, so far as the same may be practicable, pass either by assignment by deed from or by delivery by the trustees for the time being.

61. That, upon the removal, resignation, or death of any manager or any trustee of the company, the board of directors shall, at the

expense of the company, cause all such deeds and acts to be done and executed as shall be necessary for the purpose of getting out of such manager or such trustee, his heirs, executors, or administrators, all such trust property belonging to the company as may happen to be vested in the manager or trustee for the time being removed or resigning, or in the heirs, executors, or administrators of the manager or trustee so for the time being departing this life.

62. That the board of directors shall, when and so often as they shall think fit and at the expense of the company, cause declarations of trust to be executed by the manager and trustees of the company, in regard to the said house and premises, or other houses, offices, or premises, in which the business of the company may be carried on, and in regard to the funds or other property of the company which shall from time to time be vested in such manager or trustee.

63. That the board of directors shall always have in the hands of the bankers of the company, such a balance as shall be sufficient to answer the current payments and expenses of the company, and shall, when and so often as a sufficient balance cannot be obtained by any other means, sell and convert into money a competent part of the funds or property hereinafter directed to be accumulated, and of the stocks and securities in which the same shall for the time being be invested.

64. That all the various payments to which the funds or property of the company shall from time to time be subject or liable shall be made by order or resolution of the board of directors, and no payment shall be valid without such order or resolution, save and except that if in the interval between the meetings of the board of directors there shall be any sudden or unexpected demand for the payment of any money by the company, such payment may be made by the said John Styles, or other the manager of the company for the time being, for which payments the funds or property of the company shall be answerable, and that exclusive of the management fund hereinbefore mentioned, provided one or more of the directors, who shall from time to time be specially appointed by the board of directors for that purpose, shall certify in writing under his or their hand or hands the propriety of the immediate payment of such money.

65. That the board of directors shall cause at every monthly meeting of the board a certain sum not exceeding £ in the whole, to be placed in the hands of the bankers of the company, which shall be at the disposal and control of the said John Styles, or other the man-

ager for the time being, to be called the management fund, out of which the current expenses of the said concern shall be defrayed, and all goods and orders purchased or to be paid for on behalf of the company at a cost exceeding 5*l.*, shall be paid by checks drawn on the said bankers, such checks, if for answering the current and immediate expenses of the company, to be signed by the manager for the time being, and drawn upon or out of the management fund, but, if for sums ordered to be paid by the said board of directors, such checks must be signed by any three of the directors whom the board of directors may appoint to sign drafts for the company.

66. That as to so much of the funds or property of the company as shall not be required to supply the management fund and satisfy the current and immediate claims upon and expenses or other purposes of the company, the board of directors shall accumulate the same at compound interest, and shall for that purpose lay out and invest the same and all the resulting income and produce thereof in the Parliamentary stocks or public funds of Great Britain, or in Navy or Exchequer bills, or India bonds, and may either permit the said funds and property to remain in its then state of investment, or cause the same to be disposed of, called in, or otherwise converted into money, and the money arising thereby to be laid out and invested either in the Parliamentary stocks or public funds, or in Navy or Exchequer bills, or India bonds, and so from time to time as occasion shall require. Provided, nevertheless, that in every such laying out and investment, due care shall be taken so to dispose of the funds or property, that sufficient money may at all times be immediately raised whenever the same shall be required, to satisfy the current claims upon and expenses of the company.

67. That the board of directors shall cause all the ready money at the bankers to be placed to an account to be called "The London —— Ale Brewing Company Account," and shall cause all Navy and Exchequer bills, or India bonds, and other securities, to be kept either at the bankers of the company, or in the Bank of England, to be there placed to a similar account.

68. That an extraordinary board of directors specially called for the purpose shall, when and so often as the profits of the company will safely allow the same, declare a dividend out of such profits.

69. That the board of directors shall cause every dividend which shall be so declared to be divided amongst the proprietors for the time

being of the company, ratably and proportionably, according to the number of the shares in the capital of the company.

70. That within three days after a dividend shall have been declared out of the profits of the company, the board of directors shall cause a circular letter to be sent to each proprietor informing him or her of the amount of the dividend, and when the same will be payable at the office of the company.

71. That the board of directors shall cause every dividend to be declared out of the profits of the company, to be payable at the office of the company at the end of fourteen days at the most from the time when the same shall have been declared.

72. That it shall be lawful for an extraordinary board of directors, specially called for the purpose, to come to a resolution that all the proprietors and holders for the time being of shares in the capital of the company shall pay a further installment upon their respective shares in the said concern. Provided that the said board shall, by a circular letter to each of the proprietors, inform him or her of the resolution stating the amount of such further installment, and the day and place fixed by the board for the payment of such further installment, and also stating that if the same is not paid within fifteen days after the day fixed for the payment thereof, interest after the rate of 5*l.* per cent for every 100*l.* by the year, will be payable on such installment, from the day fixed for the payment thereof up to the time when the same shall be actually paid; and that if the installment is not paid within one calendar month after the day fixed for the payment thereof, the share or shares in the capital of the company of the proprietor or other holder who shall so make default, and all the benefits and advantages whatsoever attending the same, shall be liable to be forfeited to the company, and, within two days after the day fixed for the payment of such further installment, the board of directors shall cause to be sent to such proprietors or other holder for the time being of shares in the capital of the company, who shall not then have paid his or her installment, a circular letter containing a second application for the payment of the same, and setting forth the statement required in the first circular letter in regard to the payment of interest and the liability to forfeiture.

73. That, upon the neglect or refusal of any proprietor, or of the husband of any female proprietor, or of the executors or administrators of any deceased proprietor, to pay any installment within one calendar month after the day to be mentioned in the circular letter

for payment thereof, or upon the neglect or refusal of any person after his or her being approved of as a proprietor by the board of directors to execute within the time hereinafter prescribed, such deed of covenant as hereinafter is mentioned, then, and in either of the said cases, it shall be lawful for an extraordinary board of directors, specially called for the purpose, to declare that the share or shares in the capital of the company of the person or persons who shall so neglect or refuse as aforesaid, and the installment or installments paid thereon, and all the benefits and advantages whatsoever attending the same, shall thenceforth be forfeited to the company for the benefit of the other proprietors, and thenceforth to expel from the company the person (if living, and a proprietor) whose share or shares shall be so forfeited.

74. That, notwithstanding any thing hereinafter contained, it shall be lawful for the board of directors, if they should think fit, to enforce the payment of any further installment from those proprietors or other holders, who shall make default in payment of the same, instead of declaring their share forfeited pursuant to the last-mentioned clause.

75. That it shall be lawful for the board of directors, if they shall think fit, within three calendar months after any share or shares shall, under the provisions hereinafter in that behalf contained, have been forfeited to the company by reason of the person holding the same having neglected or refused to execute these presents or such deed of covenant as hereinafter is mentioned, within the sixty days hereinafter prescribed, to discharge such share or shares from the forfeiture, and restore such share or shares to the person who held the same, on his or her becoming a proprietor and executing these presents or such deed of covenant as hereinafter is mentioned, and paying to the company such a sum by way of fine, in respect of such share or shares, as the board of directors shall think fit.

76. That it shall be lawful for the board of directors, if they shall think proper, but not otherwise, at any time or times hereafter, with and out of the fund or property of the company, to purchase for the benefit of the proprietors, at such price as the board shall deem fair and reasonable, any share or shares which any proprietor may be desirous of selling.

77. That it shall be lawful for the board of directors, if they shall think proper, but not otherwise, to sell for the benefit of the proprietors for the time being, at such price or prices, and upon such terms

as the board of directors shall think proper, all or any of the shares which shall be so from time to time purchased as aforesaid, and also all or any of the shares which, under the provision contained in these presents, shall from time to time be forfeited to the company, from any cause whatsoever, to any person or persons who shall be approved of by the board as fit to become a proprietor or proprietors in respect thereof, and either with or without the dividend or other profits which may have been declared or appropriated on the said share or shares in the interval between the purchase thereof and the sale thereof by the board.

78. That, whenever any such notice as hereinafter is mentioned shall be given by any husband, executor, or administrator, desirous of becoming a proprietor, or having procured some person to become a proprietor in any respect, of all or any of the shares held by him or her in that capacity or by the assignees of a bankrupt or insolvent proprietor having procured some person to become a proprietor in respect of all or any of the shares held by him in that capacity, or by any proprietor having procured some person to become a proprietor in respect of all or any of the shares held by him or her in the capital of the company, or by any person desirous of taking or purchasing any share or shares from them, the board of directors shall proceed without delay to take such notice into consideration, and shall, under the hands of three of the directors, certify in writing to the person or persons giving the notice, their approbation or disapprobation of the person proposed in such notice to be the proprietor of such share or shares.

79. That in no case shall the board of directors permit more than one person to become a proprietor of the company in respect of any share or shares of the capital thereof, it being hereby intended that two or more persons jointly entitled, either as trustees or beneficially, to any share or shares, shall not be allowed to be joint proprietors in respect thereof.

80. That the board of directors shall cause the name and place of residence of any and every present and future proprietor, and the shares belonging to every proprietor, and the proper number of each share, to be entered in a book to be kept for that purpose, to be called the "Share Register Book," and shall, on receiving at the office of the company notice in writing of a proprietor having changed his or her name or place of residence, cause the new name of

place of residence to be entered in such book as aforesaid, and substituted for the former name or place of residence.

81. That the board of directors, on receiving at the office of the company notice in writing of any proprietor having married (being a female), or died, or become a bankrupt, or petitioned to take the benefit of any act for the relief of insolvent debtors, shall, if the proprietor respecting whom such notice shall for the time being have been received shall be a female, and shall then be married, cause the name and place of residence of her husband to be entered in the share register book, and, if the proprietor respecting whom such notice shall for the time being have been received shall have died, become bankrupt, or petitioned to take the benefit of any act for the relief of insolvent debtors, cause the name and place of residence of his or her executors, administrators, or assigns, as the case may be, to be entered in the same book.

82. That the board of directors shall also, on receiving at the office of the company notice in writing of any such husband, executor, administrator or assign, having changed his or her name or place of residence, cause the new name or place of residence to be entered in the share register book, and substituted for the former name or place of residence.

83. That, when and so often as a certificate of the marriage of any female proprietor, or the probate of the will or letters of administration of a deceased proprietor, or an official extract or copy thereof, or the deed of assignment of the estate and effects of a bankrupt or insolvent proprietor, or an attested copy thereof, or any deed or instrument by which any share in the capital of the company shall be transferred, or an attested copy of any such deed or instrument, shall, in pursuance of the directions hereinafter contained, be left at the office of the company, the board of directors shall cause a sufficient minute or extract thereof to be made in the share register book.

84. That, on any person ceasing to be a proprietor of the company, in respect of all or any of the shares held by him or her, and on any person becoming a proprietor of any share or shares in the capital of the company, the board of directors shall cause all such entries to be made in the share register book as shall be necessary, in order that the same book may at all times show who are the proprietors for the time being of the company, and the number of shares held by each proprietor, and the proper number of each share held by each of the proprietors for the time being.

85. That the board of directors shall cause every share in the capital of the company always to be distinguished by a number.

86. That the board of directors shall cause every share which shall be purchased by the board of directors, or forfeited to the company, and which shall be afterward sold, to be distinguished by the same number by which it was distinguished at the time when the same was purchased by the board of directors, or forfeited to the company.

87. That the board of directors shall cause to be delivered to every present proprietor of the company, for each share held by him in the capital of the company, a certificate under the hands of three of the directors, specifying the number of each share, and the name and residence of the person entitled thereto, and declaring that he or she is the proprietor thereof.

88. That, when and so often as any person, not a purchaser from the board of directors, shall, in the manner hereinafter required, have become a proprietor of any share or shares in the capital of the company, and any further installment or installments which may then have been previously called for on such share or shares shall have been duly paid, the board of directors shall, at any time thereafter, when required so to do by the last proprietor of such share or shares, his or her executors or administrators, and at his, her, or their expense, cause to be delivered to him, her, or them, a certificate signed by three directors, certifying that such last proprietor is no longer the proprietor of such share or shares, and mentioning the time when he or she ceased to be a proprietor of the same shares or share.

89. That, upon the bankruptcy or insolvency of any person or persons who may happen at the time of such bankruptcy or insolvency to be indebted to the company, the board of directors shall nominate and appoint such one or more of the proprietors, as they shall think proper, to prove the debt due to the company from the effects and estate of such bankrupt or insolvent, and generally to act for and on behalf of the company; and in case of such bankruptcy or insolvency, the board of directors shall also nominate and appoint the person who shall receive for and on behalf of the company the dividends or dividend which shall from time to time become due and payable in respect of such debt; and the receipts or receipt of the persons or person who shall be so nominated and appointed to receive such dividend or dividends shall effectually discharge the person or persons paying the same from being answerable or accountable for the misapplication or

non-application thereof, or from being obliged to see to the application thereof.

90. That the board of directors shall cause proper books of account to be kept, and entries to be made therein of all such matters, transactions, and things as are usually written or entered in books of account kept by persons engaged in concerns of a nature similar to the concerns of the company hereby established, and shall cause the said books of account, and all minute and other books belonging to the company, and all the reports which, in pursuance of the directions hereinafter contained, are to be produced by the board of directors at the half-yearly general meeting, and shall cause the aforesaid indenture of lease, or agreement for any lease, and all and every licenses or license for the sale of ale and beer, and also these presents, and all other deeds, documents and writings, concerning the company, except the bills, notes, and money securities hereinbefore mentioned, to remain and be kept at the office of the company; and shall at all times admit any one or more of the proprietors, upon the requisition in that behalf of any three or more of the proprietors, to have free access to these presents, and the said other documents and writings, and to examine and cast up any of the accounts to be contained in any of the said books, reports, and other documents and writings, without any hindrance or denial whatsoever.

91. That, at every general meeting, the board of directors shall cause to be produced, if called for by any three of the proprietors present, all or any of the account, minute, or other books belonging to the company, and these presents, or any deeds or other documents and writings concerning the company, which shall be in the possession of the board of directors.

92. That the board of directors shall, so far as the same may be practicable, cause to be prepared previously to and to be produced at the half-yearly general meeting, to be held in the month of March next, a report, signed by the auditors of the company, of the receipts and disbursements of the company, from the commencement thereof up to that time, and of the particulars and amount of the funds or property of the company, and of the state and condition of the company; and shall, so far as the same may be practicable, cause to be prepared previously, and to be produced at every half-yearly general meeting to be held after the half-yearly general meeting in next, a report signed by the auditors of the company, of such of the receipts and disbursements of the company, up to that time, as shall not have

been included in any preceding report, and of the particulars and amount of the funds or property of the company, and of the state and condition of the company.

93. That, whenever two such successive extraordinary general meetings, as hereinbefore mentioned, shall have come to a resolution to dissolve the company, the board of directors shall cause so much of the funds or property of the company, as shall not then consist of money, to be forthwith sold or otherwise converted into money; and, as soon as conveniently may be after such resolution, so much of the funds or property of the company as shall remain after answering or providing for the claims and demands thereupon, shall be paid to and distributed by the board of directors amongst the proprietors, or their respective executors, or administrators, or assigns, in the proportions in which they shall be respectively entitled thereto; and, immediately after such payment and distribution, the company shall be dissolved, and these presents, and every clause, article, matter, and thing herein contained, shall thenceforth cease, determine, and be void.

94. That, when and so often as any person or persons shall break, or refuse or neglect to perform or comply with any of the covenants, agreements, and provisions contained in these presents, and which, on his, her, or their part, ought to be performed and complied with; or when and so often as the default or misconduct of any person or persons shall render any action, suit, or other proceeding necessary, it shall be lawful for the board of directors, when and so often as they, in their discretion, shall think fit, to order or direct an action, suit, or other proceeding to be brought, commenced, carried on, and prosecuted or defended, for or on account of any such refusal, neglect, or default, and also for or on account of any of the funds or property of the company, of any contract or engagement for or on behalf of the company, or of any other cause, matter, or thing concerning the rights and interests of the company. And it shall be lawful for the board of directors to cause any action, suit, or other proceeding which shall be so brought, commenced, carried on, prosecuted, or defended by their order or direction as aforesaid, to be stayed, compounded, or compromised; and also to cause all disputes and differences, upon which there may be cause for any such action, suit, or other proceeding, to be referred to arbitration, either before or after the commencement of such action, suit, or other proceeding; and also to order or direct the necessary party or parties for or on behalf of the company to bring, commence, carry on, prosecute, or defend

any such action, suit, or other proceeding; and also to order or direct such necessary party or parties afterward to stay, compromise, or compound such action, suit, or other proceeding; and also to order or direct such necessary party or parties to refer any such dispute or difference to arbitration, either before or after the commencement of any such action, suit, or other proceeding; and such necessary party or parties to any such action, suit, or other proceeding, shall not release or voluntarily discontinue or become nonsuit in such action, suit, or other proceeding, without the consent of the board of directors, and shall be indemnified out of the fund or property of the company, and the board of directors shall dispose of the same accordingly.

95. That, subject and without prejudice to the powers hereinbefore given to the general meetings, the board of directors shall have the entire management of and superintendence over the affairs and concerns of the company, and shall, in all cases provided for by these presents, or hereafter to be provided for by the general meetings, act in strict conformity to the laws and regulations hereby established, or hereafter to be established by the general meetings; but, in all cases for the time being unprovided for by these presents, or by the general meetings, it shall be lawful for the board of directors to act in such manner as shall appear to them best calculated to promote the welfare of the company; and for the better guidance of the board of directors in the management of and superintendence over the affairs and concerns of the company, it shall be lawful for an extraordinary board of directors, specially called for the purpose, to make whatever by-laws and rules they shall think proper, provided the same be not inconsistent with or repugnant to the fundamental principles of the company, as established and settled by these presents, or as altered and changed by virtue of the powers hereinbefore given to the general meetings for that purpose, and at any time to alter or repeal all or any of the by-laws or rules which may be so made.

96. That the report to be prepared in pursuance of the directions hereinbefore contained by the board of directors, previously to the holding of every half-yearly general meeting, shall be examined, and the accounts from which such report shall or ought to have been drawn shall be audited by the auditors of the company; and, in order thereto, the auditors shall, with the assistance of the clerks of the company, inspect and examine all the books and vouchers of the company which they shall think necessary; and, after a careful examination of such reports with such books, papers, and vouchers, and

correcting and altering the same, if necessary, the auditors shall, previously to the day on which the half-yearly general meeting is to be held, at which such report must be produced, sign their names at the foot thereof, in testimony of their respective approbation of the same.

97. That the trustees of the company shall never consist of more or less than three.

98. That the trustees of the company, in whom any of the funds or property of the company shall for the time being be vested, shall stand possessed of the same in trust for the company, and shall apply and dispose of the same in such manner, for the benefit of the company, as the board of directors shall, conformably to the duties imposed on them by these presents, from time to time order or direct.

99. That the chairman and deputy chairman of the board of directors, or any director, auditor, or trustee of the company, may at any time vacate his office by sending in his resignation in writing to the board of directors of his intention so to do.

100. That the receipt or receipts in writing of any three of the directors for the time being, and the receipt or receipts in writing of the manager, or the trustees, or bankers for the time being, for any of the moneys of the company, which may be paid to such directors, managers, trustees, or bankers, shall effectually discharge the person or persons paying the same from being obliged to see to the application thereof, or from being answerable or accountable for the misapplication or non-application thereof.

101. That the directors, auditors, manager, trustees, and other officers for the time being of the company, and each and every of them, and their and each and every of their executors and administrators, shall be indemnified and saved harmless out of the funds or property of the company from and against all costs, charges, losses, damages, and expenses which they or any of them, or their or any of their executors or administrators, shall or may incur or sustain by reason or in consequence of or on account of any contract or engagement into which they may enter on behalf of the company, or any action, suit, or other proceeding, either at law or in equity, relating to or in consequence of, or on account of any contract or engagement into which they may enter on behalf of the company, or any action, suit, or other proceeding, either at law or in equity (relating to or in consequence of the acts or property of the company, or the acts, neglects, or defaults of any one or more of the directors or other per-

sons in the employ of the company), which the board of directors, at any general meeting, may order to be commenced, prosecuted, or defended, or otherwise in or about the execution of their respective offices or trusts, except such costs, charges, losses, damages, or expenses as shall happen or occur through their or any of their own willful neglects or defaults; and that none of them shall be answerble for any act or default of any one or more of the others of them, or for joining in receipts for the sake of conformity, or for any person or persons who shall collect or receive the debts or moneys of the company, or for any banker or other person with whom any moneys or effects belonging to the company shall or may be lodged or deposited for safe custody or otherwise, or for the insufficiency or deficiency of any security upon which any moneys of or belonging to the company shall be placed out or invested, or for any other loss, misfortune, or damage which may happen in the execution of their respective offices or trusts, or in relation thereto, except the same shall happen by or through their or his own willful neglect or default respectively.

102. That every proprietor or other holder for the time being of shares in the capital of the company shall pay every installment that may hereafter be called for by an extraordinary board of directors in the manner hereinbefore required, on his or her share, or on each of his or her shares in the capital of the company, on or before the day and at the place mentioned in the circular letter calling for the same.

103. That in no case shall any proprietor or other holder be liable to pay at any one time, in respect of any one share, a larger installment than another proprietor or other holder, or to pay at any one time as an installment on any one share more than the sum of £ , or to pay in respect of any one share more than the sum of 10*l.* in the whole, including the said deposit or installment already paid.

104. That the legatees and next of kin of deceased proprietors shall not be entitled to hold, in either of those capacities, any share or shares in the capital of the company. But, in all cases where legatees or next of kin of deceased proprietors shall become entitled to any share or shares in the capital of the company, the executors or administrators of such deceased proprietor shall, as between themselves and the company, be considered as the holders of such share or shares, and shall be the only persons who shall be entitled either to become proprietors or to procure any other person to become proprietor in respect of such share or shares.

105. That the husband of any female proprietor, or the executor or administrator of any deceased proprietor, shall not be a proprietor in respect of any share held by him or her in the capital of the company in that capacity, but may, in the manner and upon the terms hereinafter mentioned, either become a proprietor or procure some other person so become a proprietor in respect of any share so held by him or her.

106. That, before any husband, executor, or administrator can become a proprietor, or can procure any other person to become a proprietor in respect of any share held by him or her in that capacity, he or she shall leave or cause to be left at the office of the company, for the space of one week, the certificate of the marriage, or (as the case may be) the probate of the will, or letters of administration under which he or she may claim or be entitled to such share or shares, or otherwise an official extract or copy of such will or letters of administration, in order that a minute or extract of such certificate, will, or administration, respectively, may be entered in the share register book.

107. That the assignees of any bankrupt or insolvent proprietor shall not be proprietors in respect of any share held by them in the capital of the company in that capacity, but may, in the manner and upon the terms hereinafter mentioned, procure some person to become a proprietor in respect of any share so held by them.

108. That, before the assignees of any bankrupt or insolvent proprietor can procure any person to become a proprietor in respect of any share held by them in that capacity, they shall leave or cause to be left at the office of the company, for the space of one week, the deed by which the effects of the bankrupt or insolvent proprietor were assigned to them, or an attested copy of such deed, in order that a minute or extract thereof may be entered in the share register book.

109. That any proprietor of the company may procure some other person to become a proprietor in respect of all or any of the shares held by him or her in the capital of the company.

110. That the husband of any female proprietor, and any executor or administrator of a deceased proprietor, who shall be desirous of becoming a proprietor in respect of all or any of the shares held by him or her in that capacity, and also any person who shall be desirous of taking or purchasing any share or shares from the board of directors, shall give notice in writing at the office of the company, of

such his or her desire, and shall describe in such notice his or her name or place of abode, and the number of the share, or of each of the shares in respect of which he or she is desirous of becoming a proprietor.

111. That the holder or holders of any share or shares in the capital of the company, whether such holder or holders shall be a proprietor, or the husband of a female proprietor, or the executors or administrators, or any one or more of the executors or administrators of a deceased proprietor, or the assignees of a bankrupt or insolvent proprietor or proprietors, who shall have procured some person or persons to become a proprietor or proprietors of all or any of his, her, or their shares in the capital of the company, shall give notice in writing at the office of the company of his, her, or their having procured such person or persons to become a proprietor or proprietors, and shall describe in such notice the name and place of abode of such proposed proprietor, and the number of the share, or of each of the shares in respect of which he, she, or they shall have procured such person or persons to become a proprietor or proprietors.

112. That, whenever the board of directors shall, in the manner hereinbefore required, have certified that any executor or administrator who may be desirous of becoming a proprietor, or any person who may have been procured to become a proprietor of any share or shares in the capital of the company, is fit to be a proprietor of such share or shares, the proprietor, or the assignees of the bankrupt or insolvent proprietor, or the executor or administrator of the last proprietor, shall be at liberty to transfer the same without delay.

113. That every transfer of any share or shares in the capital of the company shall be made either at the office of the company or at such other place as the board shall require, and in such manner as the board shall prescribe, for vesting the share or shares in the proposed new proprietor.

114. That every deed of transfer shall be prepared by the solicitor for the time being of the company, who shall be paid by every person to whom a transfer may be made the sum of , exclusively of stamp duty, for each deed of transfer.

115. That the deed or instrument by which any share shall be transferred, or an attested copy of such deed or instrument, shall, within six days after the execution thereof, be left at the office of the company for the space of three days by the person to whom the assignment shall be made in order that an extract or minute thereof may be entered in the share register book.

116. That every husband who may be desirous of becoming a proprietor in respect of all or any of the shares held by him in that capacity, and every person who may take or purchase any share or shares in the capital of the company from the board of directors, and who shall be approved of by the board in the manner hereinbefore required, as fit to be a proprietor in respect of such share or shares, and who shall not at the time of such approval be a proprietor of the company, shall within one calendar month after such approval shall have been certified to him or her by the board of directors, execute at the office of the company, or at such other place as the board shall require, either in person or by attorney, a deed of covenant by which he or she shall covenant to abide by the rules and regulations of the company.

117. That every person who may have been approved of by the board of directors as fit to become a proprietor in respect of any share or shares in the capital of the company, and to whom a transfer of such share or shares shall have been made, and who shall not, at the time of such transfer being made, be a proprietor of the company, shall, within one calendar month after such transfer shall have been made, execute at the office of the company, or at such other place as the board shall require, either in person or by attorney, a deed of covenant to abide by the rules and regulations of the company.

118. That every deed of covenant to be executed in the cases hereinbefore mentioned, by any person or persons becoming a proprietor or proprietors of the company, shall at all times be prepared by the solicitor for the time being of the company, who shall be paid the sum of , exclusively of stamp duty, for every such deed of covenant by the person or persons executing the same and entering into the covenants therein contained.

119. That all dividends and other profits which may be declared or appropriated on any share of any female, or deceased bankrupt, or insolvent proprietor, in the interval between the time of her or his marriage, death, bankruptcy, or petitioning to take the benefit of any act for the relief of insolvent debtors, and of some person becoming a proprietor of such share, shall not be received, neither, during such interval, shall the rights and privileges attending such share be exercised by any person or persons whomsoever, but the same respectively shall remain in suspense, and as soon as any person shall become a proprietor of such share, the husband of such female proprietor, or the executors or administrators of such deceased proprietor, or the

assignees of such bankrupt or insolvent proprietor, shall, on payment of all installments which may have been previously called for and may then remain unpaid on such share, may be entitled to receive the dividends and other profits which may have been so suspended as aforesaid.

120. That every husband who may have been approved of by the board of directors in manner hereinbefore mentioned, as a fit person to become a proprietor of any share in the capital of the company, held by him in that capacity, and every person who may be approved of in like manner as a fit person to become a proprietor of any share which he or she may take or purchase from the board of directors, and who, at the time of such approval, shall be a proprietor of the company in respect of any other share or shares, shall, as to the share in respect of which he or she may have been so as aforesaid approved of as fit to become a proprietor, be, from the time of such his or her approval, considered a proprietor of the company, and subject to all the installments which may thereafter be called for on such share, and to all other duties, claims, and demands in respect of the same, and (in the case of husband) shall then be entitled to receive the dividends and other profits (if any) which may have remained in suspense in respect of such share.

121. That every person who may have been approved of as fit to become a proprietor of any share in the capital of the company held by him in the capacity of husband of a female proprietor, or may have been approved of as fit to become a proprietor of any share which he or she may be desirous of taking or purchasing from the board of directors, and who, at the time of such approval, shall not be a proprietor of the company, shall, from the time of his or her executing the deed of covenant hereinbefore required, be considered a proprietor of the company, and (in the case of a husband) shall then be entitled to receive the dividends and other profits (if any) which have remained in suspense in respect of such share.

122. That every person who may have been approved of by the board of directors as fit to become a proprietor in respect of any share in the capital of the company, and to whom a transfer shall have been made of such share, and who on the day of the date of such deed of transfer shall be a proprietor of the company in respect of any other share or shares shall as to such share which may have been so transferred to him or her, be considered a proprietor of the company from the day of the date of the deed by which the same share

was transferred to him or her, and shall thenceforth be subject to all the installments which may thereafter be called for on such share, and to all other duties, claims, and demands in respect of the same.

123. That every person who may be approved of by the board of directors as fit to become a proprietor in respect of any share in the capital of the company, and to whom a transfer shall have been made of such share, and who on the day of the date of such deed of transfer shall be a proprietor of the company in respect of any other share or shares, shall, as to such share which may have been so transferred to him or her, be considered a proprietor of the company from the day of the date of the deed by which the same share was transferred to him or her, and shall thenceforth be subject to all the installments which may be thereafter called for on such share, and to all other duties, claims, and demands in respect of the same.

124. That every person who may have been approved of by the board of directors, as fit to become a proprietor in respect of any share in the capital of the company, and to whom a transfer shall have been made of such share, and who, on the day of the date of such deed of transfer, shall not be a proprietor of the company, shall, from the time of his or her executing the deed of covenant hereinbefore required, be considered a proprietor of the company.

125. That when and so often as any person, not a purchaser from the board of directors, shall in the manner hereinbefore required, have become a proprietor of any share or shares in the capital of the company, the last proprietor of such share or shares, and all persons claiming by, from, or under him or her (except the new proprietor), shall, from the time of such new proprietor becoming a proprietor in respect of such share or shares, and on payment of any further installment or installments which may then have been previously called for on such share or shares, be forever acquitted and discharged from all other liabilities and obligations in respect of such share or shares, and from all other or further claims and demands on account of the same, and the certificate to be given by the board of directors as hereinbefore required, of such person having ceased to be a proprietor in respect of such share or shares, shall at all times be evidence of such acquittance and discharge as aforesaid, in respect of such share or shares.

126. That when and so often as any person, not a purchaser from the board of directors, shall, in the manner hereinbefore required, have become a proprietor of any share or shares in the capital of the company, the last proprietor of such share or shares, and all persons

claiming by, from, or under him or her (except the new proprietor), shall, from the time of such new proprietor becoming a proprietor, have no claim or demand whatsoever, either at law or in equity, either upon or against the company, or any one or more of the proprietors thereof for the time being, other than such new proprietor, his or her executors or administrators, for or on account or in anywise relating to such share or shares, except in respect of the dividends and other profits which may have been declared or appropriated previously to the time of such new proprietor being a proprietor.

127. That any person entitled to a certificate of any share newly acquired by him or her in the capital of the company, and who, at the time of acquiring such share, shall be a proprietor of the company in respect of any other share or shares, and on that account shall not be required to execute such deed of covenant as aforesaid, in respect of the share or shares specified in such certificate, shall, at his or her expense, or at the expense of the company, at the option of the board of directors, on receiving the said certificate, give to the board a receipt under his or her hand for the same, in such form as the board shall prescribe, and such receipt shall be evidence of the person who gave the receipt being the proprietor of the share or shares specified in the certificate for which such receipt shall have been given.

128. That the report, which in pursuance of the directions hereinbefore contained is to be produced by the board of directors at every half-yearly general meeting, shall, after the same shall have been approved of either at the general meeting at which it is to be produced, or at any subsequent general meeting, and signed by the chairman of the meeting in testimony of such approval, be binding and conclusive on all the proprietors of the company, unless some manifest error to the amount of 20*l.*, or upward, be discovered therein by any one or more of the proprietors of the company within twelve calendar months after such approval; and such report, when the error therein shall be rectified by the board of directors in pursuance of the directions hereinbefore contained, shall be binding and conclusive on all the proprietors.

129. That each and every of the proprietors, by whom the business of the company shall for the time being be managed and conducted, shall and will be just and faithful to the others, and each and every of the others of them, and also to all the other proprietors, and to each and every other proprietor, in all buyings, sellings, reckonings, receipts, payments, dealings, and transactions in or about the said

business, or in anywise relating thereto, and shall and will give and render a just and faithful account of the same to the board of directors, if required so to do by a previous board of directors, or to an extraordinary general meeting specially called for the purpose, if required so to do, either by the board of directors, or by seven or more proprietors, each of whom, other than present proprietors, shall have been a proprietor of the company for at least three calendar months.

130. That none of the directors (except the manager by these presents authorized so to do, and except any proprietor or proprietors acting under the order or direction of the board of directors) shall buy, order, sell, or contract for any goods, wares, merchandise, articles, or any thing whatsoever, for or on account of the company, and if any of the proprietors (except as aforesaid) shall so buy, order, or contract as aforesaid, then and in such case the goods, wares, merchandise, articles or things which shall have been so bought, ordered, or contracted for, shall be paid or accounted for by the proprietor or proprietors who shall buy, order, or contract for the same, out of his, her, or their separate estate, and shall remain and be for his, her, or their separate use and benefit.

131. That each and every of the proprietors shall and will at all times duly and effectually pay and discharge all the private and separate debts now or hereafter to be due and owing from him or her to any person or persons whomsoever, and shall and will at all times hereafter save, defend, and keep harmless and indemnified all the other proprietors, and each and every of them, and their and his heirs, executors, administrators, and assigns, and the funds and property of the company, from and against such private and separate debts, and all actions, suits, executions, costs, charges, damages and expenses for or on account of the same, or in anywise relating thereto.

132. That none of the proprietors shall do, or knowingly suffer to be done, or be party or privy to any act, deed, matter, or thing whatsoever, whereby or by reason whereof the funds or property of the company may be seized, attached, extended, or taken in execution or in anywise charged, affected, or incumbered, to the damage, loss, or injury of the other proprietors, or their executors or administrators.

133. That every proprietor of the company, his or her executors or administrators, as between him, her, and them, and all or any of the other proprietors of the company, and their respective heirs, executors, and administrators, shall be answerable and accountable, and liable

for or in respect of the calls, debts, losses, and damages of or upon the company in proportion to his or her share and interest for the time being in the funds or property of the company, but not further or otherwise, and no person, his or her heirs, executors or administrators, shall, in respect of any share or shares which shall have been held by him or her as proprietor, be answerable or accountable or liable for or in respect of such calls, debts, losses, or damages, or any of them, in any manner or to any extent or upon any account, or from any cause whatsoever, after some other person or persons shall have become a proprietor or proprietors of the company in respect of such share or shares.

134. That when and so often as any dispute or difference shall arise among or between the proprietors, or any of them, or among or between any one or more of the proprietors, or the husband, executors, administrators, or assignees of any female, or deceased, or bankrupt, or insolvent proprietor, in anywise relating to any of the affairs or concerns of the company, the same shall be submitted or referred to arbitration in manner hereinafter mentioned (that is to say), in case the dispute or difference shall be between two parties, then one of the parties, whether consisting of one or more person or persons, shall name an arbitrator, and the other of the said parties, whether consisting of one or more person or persons, shall also name an arbitrator, and the two arbitrators shall, within ten days after their nomination, appoint a third arbitrator, and the award of any two such three arbitrators shall be final and conclusive; and in case the two arbitrators named shall refuse or decline, or cannot agree within such ten days to name a third arbitrator, then any one of the directors for the time being, not a party to the dispute or difference, shall be at liberty to name a third arbitrator, and shall, in the event of the two arbitrators still refusing or declining to act, be the sole arbitrator, and the award of such arbitrator shall be final and conclusive; and in case the subject of dispute or difference shall be between three or more parties, then each of the said parties, whether of one or more persons, shall name an arbitrator, and the arbitrators shall within ten days after their nomination appoint another arbitrator, and the award of such last-mentioned arbitrator, with or without the arbitrators or any one or more of them, shall be final and conclusive; and in case the arbitrators so to be named by the said three or more parties, cannot agree in the nomination of the other arbitrator within such ten days as aforesaid, then a third arbitrator may be chosen in manner aforesaid,

whose award shall in like manner be final and conclusive; and the arbitrators or arbitrator, to whom for the time being any dispute or difference shall stand referred as aforesaid, shall be at full liberty, if they or he shall think fit, to make one or more award or awards touching all or any part of the subject of dispute or difference. And that every such award shall be binding on all the said parties, although the same may not be final and conclusive as to the whole subject of dispute or difference; and that no suit or action shall be commenced or brought by any of the proprietors against any other or others of them, or against the said arbitrators or arbitrator touching the matter aforesaid; and that all necessary books, papers, and writings shall be produced before the said arbitrators or arbitrator; and that all parties to the said reference shall be examined before the said arbitrators or arbitrator, if they or he shall think fit; and that the submission shall be made a rule of His Majesty's Court of King's Bench at Westminster. In witness, etc.

No. XVIII.

1 VICT. CAP. LXXIII.

An Act for better enabling Her Majesty to confer certain Powers and Immunities on Trading and other Companies, 17th July, 1837.

Whereas divers associations are and may be formed for trading or other purposes, some of which associations it would be inexpedient to incorporate by royal charters, although it would be inexpedient to confer on them some of the privileges of and incident to corporations created by royal charters, and also to invest such associations or some of them with certain other powers and privileges: And whereas it would also be expedient to extend the powers of Her Majesty in reference to the creation of corporations, and to the conferring of privileges upon corporations, and upon other bodies or companies enabled to sue and be sued: And whereas, by an act passed in the sixth year of the reign of His Majesty King George the Fourth, entitled "An Act to repeal so much of an act passed in the sixth year of His late Majesty King George the First, as relates to the restraining of several extravagant and unwarrantable practices in the said act mentioned; and for conferring additional powers upon His Majesty with respect to the

granting of Charters of Incorporation to trading and other companies;" it was among other things enacted, that in any charter thereafter to be granted by His Majesty, his heirs or successors, for incorporation of any company or body of persons, it should and might be lawful in and by such charter to declare and provide that the members of such corporation should be individually liable in their persons and property for the debts, contracts and engagements of such corporation, to such extent and subject to such regulations and restrictions as His Majesty, his heirs or successors might deem fit and proper, and as should be declared and limited in and by such charter, and the members of such corporation should thereby be rendered so liable accordingly: And whereas, by an act passed in the session of Parliament held in the fourth and fifth years of the reign of His late Majesty entitled "An Act to enable His Majesty to invest trading and other companies with the powers necessary for the due conduct of their affairs, and for the security of the rights and interests of their creditors;" His Majesty, his heirs and successors were empowered to grant to unincorporated companies and associations certain privileges in such last-mentioned act set forth: And whereas the aforesaid provisions of the said recited acts have not been found effectual for the purposes thereby intended, and it is therefore expedient to repeal the same, and to make such provisions in reference to the several matters aforesaid as are hereinafter contained: Now, therefore, be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that so much of the said act of the sixth year of the reign of His Majesty King George the Fourth as is hereinbefore set forth, and also the said recited act of the session of Parliament held in the fourth and fifth years of the reign of His late Majesty King William the Fourth, shall be and they are hereby respectively repealed.

2. And be it enacted, that it shall and may be lawful for Her Majesty, her heirs and successors, by letters patent to be from time to time for that purpose issued under the great seal of the United Kingdom of Great Britain and Ireland, or in Scotland under the seal appointed by the Articles of Union to be used instead of the great seal thereof, to grant to any company or body of persons associated together for any trading or other purposes whatsoever, and to the heirs, executors, administrators, and assigns of any such persons, although not incorporated by such letters patent, any privilege or

privileges which, according to the rules of the common law, it would be competent to Her Majesty, her heirs and successors, to grant to any such company or body of persons in and by any charter of incorporation.

3. And be it enacted, that in any such letters patent so to be granted as aforesaid by Her Majesty, her heirs or successors, to any such company or body of persons so associated together as aforesaid, but not incorporated, it shall and may be lawful, in and by such letters patent, either expressly or by a general or special reference to this act, to provide and declare that all suits and proceedings, whether at law, in equity, or in bankruptcy or sequestration, or otherwise howsoever, as well in Great Britain and Ireland as in the colonies and dependencies thereof, by or on behalf of such company or body, or any person or persons as trustee or trustees for such company or body, against any person or persons whether bodies politic or others, and whether members or not of such company or body, shall be commenced and prosecuted in the name of one of the two officers for the time being to be appointed to sue and be sued on behalf of such company or body, and registered in pursuance of the directions of such appointment and registration respectively hereinafter contained; and that all suits and proceedings, whether at law or in equity, by or on behalf of any person or persons, whether bodies politic or others, and whether or not members of such company or body, against such company or body, shall be commenced and prosecuted against one of such officers, or if there shall be no such officer for the time being, then against any member of such company or body: Provided nevertheless, that nothing in this act or in such letters patent contained or to be contained shall prevent the plaintiff from joining any member of such company or body with such officer as a defendant in equity, for the purpose of discovery, or in case of fraud.

4. And be it enacted, that it shall and may be lawful, in and by such letters patent so to be granted to any such body or company as aforesaid, to declare and provide that the members of such company or body so associated as aforesaid shall be individually liable in their persons and property for the debts, contracts, engagements, and liabilities of such company or body to such extent only per share as shall be declared and limited in and by such letters patent; and the members of such company or body shall accordingly be individually liable for such debts, contracts, engagements, and liabilities respectively to such extent only per share as in such letters patent shall be declared and

limited; such liability nevertheless to be enforced in such manner and subject to such provisions as are hereinafter contained.

5. And be it enacted, that every such company or body to which any such privileges or powers as hereinbefore mentioned shall be granted under the authority of this act shall be entered into or formed by a deed of partnership or association, or an agreement in writing of that nature; and the undertaking shall by such deed or agreement be divided into a certain number of shares to be there specified; and in such deed or agreement, or in some schedule thereto, there shall be set forth the name or style of the said company or body, the names or styles of the members of the said company or body, the date of the commencement thereof, the business or purpose for which the said company or body is formed, and the principal or only place for carrying on such business; and in such deed or agreement there shall also be contained the appointment of two or more officers to sue or be sued on behalf of such company or body in manner hereinafter mentioned.

6. And be it enacted, that such company or body as aforesaid shall, within three calendar months after the grant of such letters patent as aforesaid, make or cause to be made a return to such one of the offices for enrollment hereinafter mentioned as shall be required under the provisions of this act, containing the date of the grant of such letters patent as aforesaid, the name or style of the said company or body, the business or purpose for which the said company or body is formed, the principal or only place for carrying on such business, the total number of shares in the said company or body (and each of which shares is to be distinguished by a separate number in regular succession), the amount to which each share shall render the holder thereof liable, the names and (except as to bodies politic) the places of abode of all the members thereof, and the distinctive number or numbers of the share or respective shares which each member holds; and such company or body shall also at the same time make a return of the names and descriptions of the officers appointed by such company or body to sue and be sued on behalf thereof in manner aforesaid; such return to be made in the form in the schedule (A) to this act annexed.

7. And be it enacted, that during the continuance of any such company or body after it shall have been so registered no change shall be made in the name or style thereof; and if the principal or only place for carrying on the business of the said company or body shall

be changed, the said company or body shall, within three calendar months after such change, make or cause to be made a return to the said office as aforesaid of such change in the form in schedule (B) to this act annexed.

8. And be it enacted, that in case any person shall cease to be a member of such company or body (except by means of the transfer by deed or writing of any share therein), or in case of the addition of any person thereto (except by means of the transfer of any share as aforesaid), or of the change of the name of any member thereof by marriage or otherwise, the said company or body shall, within three calendar months after information shall be received by the said company or body of any person so ceasing as aforesaid, or of such change or addition as aforesaid, make or cause to be made a return to the said office as aforesaid, containing the names and places of abode of all persons having ceased to be members thereof (except as aforesaid), and the names and places of abode of all persons having become members thereof (except as aforesaid), and specifying any change in the name of any member thereof by marriage or otherwise, such return to be made in one of the forms in the schedule (C) to this act annexed, as the case may be.

9. And be it enacted that on the transfer by deed or writing of any share in any such company or body as aforesaid, a notice in writing specifying the date of such transfer, the distinguishing number of the share transferred, the name and (except in the case of a body politic), the place of abode of the person by whom or on whose behalf and of the name and (except as aforesaid) the place of abode of the persons to whom such transfer is made, shall be given to the said company or body, by leaving the transfer when executed by both parties, or some note or memorandum thereof signed by them, at the principal or only office of the said company or body.

10. And be it enacted that in case of the transfer of any share in such company or body, the said company or body shall, within three calendar months after receiving such notice as aforesaid of such transfer, make or cause to be made a return to the said office as aforesaid, containing the date of such transfer, the distinguishing number of the share transferred, the name and (except in the case of a body politic) the place of abode of the person by whom or on whose behalf such transfer is made, and of the person to whom such transfer is made, in the form in schedule (D) to this act annexed; and such

company or body are hereby required, on the request in writing of either of the parties, forthwith to make such return accordingly.

11. And be it enacted that where the extent per share of the liability of the individual members of any such company or body shall have been limited by letters patent as aforesaid, it shall be lawful for any person who shall or may from time to time have advanced or paid any sum in consequence or by virtue of any execution or diligence issued against him in respect of any share in such company or body, under any judgment, decree, interlocutor, or order to be obtained against any officer of the said company or body, or any member thereof, in manner hereinafter mentioned, to make a return thereof to such office as aforesaid in the form in schedule (E) to this act annexed; and every such return shall be accompanied with a proper voucher or vouchers of the fact of such payment, without which the same shall not be registered as hereinafter mentioned.

12. And be it enacted that if any sum or sums shall at any time be repaid by any such company or body as last aforesaid in respect of any such sum which may have been so advanced or paid by virtue of such execution or diligence, the said company or body shall forthwith make or cause to be made a return to such office as aforesaid, specifying the amount of such repayment in the form in schedule (F) to this act annexed.

13. And be it enacted that in case of the death or resignation or removal of any officer appointed to sue and be sued on behalf of any company or body to be formed in pursuance of any of the provisions of this act, the said company or body shall forthwith appoint in his stead another officer to sue and be sued on behalf of such company or body, and shall, within three calendar months after the death, resignation or removal of such officer as aforesaid, make or cause to be made a return to the said office as aforesaid, containing as well the name and description of the person who has ceased to be such officer in manner aforesaid as the name and description of the officer who has been appointed to sue and be sued on behalf of such company or body, such return to be made in the form in schedule (G) to this act annexed.

14. And be it enacted that all returns to be made in manner aforesaid by such company or body shall be signed by one of such officers and shall be verified by a declaration of such officer made pursuant to the provisions of the statute of the fifth year of His late Majesty's reign, entitled "An Act to repeal an act of the present session of

Parliament, entitled 'An Act for the more effectual abolition of oaths and affirmations taken and made in various departments of the State, and to substitute declarations in lieu thereof, and for the more entire suppression of voluntary and extra-judicial oaths and affidavits; and to make other provisions for the abolition of unnecessary oaths," except that if there shall be no such officer, or such officer shall refuse to act, then such return shall be signed and verified as aforesaid by some member of the said company or body.

15. And be it enacted that any return to be made in manner aforesaid, of the name or place of abode of any original member of such company or body, or of any person to or in whom any share in such company or body shall be transferred or become vested, shall not be rendered invalid for the purposes of this act by any error or omission in the same, if the said company or body shall, within one calendar month after information of such error or omission shall be received by such company or body, cause a correct return to be made to the said office as aforesaid in the form in schedule (F) to this act annexed: Provided always, that this clause shall not invalidate or prejudice any intermediate transaction or matter whatsoever which shall have *bona fide* taken place or proceeded upon the faith of such erroneous or defective return, nor shall the benefit of this clause extend to any error or omission which shall be fraudulent.

16. And be it enacted that where the principal or only place for carrying on the business of any such company or body as aforesaid shall be situated in any part of England or Wales, the returns hereinbefore directed shall be made to the enrollment office of the Court of Chancery in England, and where such principal or only place for carrying on such business shall be situate in any part of Scotland, such returns shall be made to His Majesty's General Registry Office at Edinburgh, and where such principal or only place for carrying on such business shall be situated in any part of Ireland, such returns shall be made to the enrollment office of the Court of Chancery in Ireland.

17. And be it enacted that all such returns as are hereinbefore directed to be made to the enrollment office of the Court of Chancery in England shall be registered by the clerks of enrollments in Chancery, or their deputy, and that all such returns as are hereinbefore directed to be made to the general registry office at Edinburgh shall be registered by the lord clerk register or his deputy, and all such returns as are hereinbefore directed to be made to the Enrollment Office of the

Court of Chancery in Ireland, shall be registered by the clerks of enrollments in Chancery in Ireland, or their deputy, in books to be by them respectively kept for that purpose, and that an alphabetical index shall be kept of the names of such companies or bodies, with references to such returns, and that there shall be paid for the registering of each return a fee of sixpence per folio, and no more; and that any person shall be at liberty to inspect such books and index, and that there shall be paid for such inspection a fee of one shilling, and no more; and that any person shall be at liberty to require a copy of any such return to be certified by the said clerks or their deputy, and that there shall be paid for such certificate a fee of one shilling and sixpence for each folio of such copy, and no more; and the day of the registration of every return to be made in pursuance of this act shall be written on such return by the said clerks or their deputy.

18. And be it enacted, that a copy, so certified as aforesaid, of such return, including the date to be marked on such return, shall be received in evidence in all proceedings, whether civil or criminal, and shall also be received as evidence of the day of the registering thereof.

19. And be it enacted, that such orders and directions as to the forms of the returns to be made in pursuance of this act, and the mode of keeping the register, and of making the index thereof, and of any other matters incidental thereto, as may be deemed expedient, may from time to time be made, altered, or varied as follows: that is to say, as regards the registration to be made in the Enrollment Office in the Court of Chancery in England, by the Lord Chancellor, Lord Keeper, or First Lord Commissioner of the Great Seal, and the Master of the Rolls, jointly; as regards the registration to be made in the General Registry Office in Edinburgh, by the lord clerk register and lords of council and session jointly; and as regards the registration to be made in the Court of Chancery in Ireland, by the Lord Chancellor of Ireland and the Master of the Rolls in Ireland jointly.

20. And be it enacted, that no person becoming a member of any such company or body by the transfer of any share therein, or otherwise, shall be entitled to sue for or recover any share of the profits thereof, unless and until a return of the transfer or other fact whereby he shall so become a member shall be registered pursuant to the provisions hereinbefore contained.

21. And be it enacted, that any person ceasing to be a member of any such company or body, whether by the transfer of any share

therein, or by death or otherwise, shall be considered for all purposes of liability as continuing a member of such company or body until a return of the transfer or other fact whereby he shall have so ceased to be a member shall be registered pursuant to the provisions hereinbefore contained.

22. And be it enacted, that no action, suit, or proceeding, whether civil or criminal, commenced either by or against any such company or body (whether in the name of one of the officers appointed to sue and be sued as aforesaid, or of some member of such company or body, in the case and in manner aforesaid), shall be abated or prejudiced by the death or by any act of such officer or person, or by the resignation or removal of such officer, either before or after the commencement of such action, suit, or proceeding, or by any change in the members of such company or body by the transfer of shares or otherwise, but that the same shall be continued in the name of such officer or member (as the case may be) notwithstanding such death or act, or such resignation or removal, and notwithstanding such change in the members of such company or body.

23. And be it enacted, that in all such actions, suits, and other proceedings, whether civil or criminal, the evidence of any such officer as aforesaid, or of any member of such company or body, shall be admissible in the like manner as if such officer or member were not an officer or member of such company or body.

24. And be it enacted, that all judgments, decrees, interlocutors, and orders obtained in any such actions, suits, or other proceedings as aforesaid against such officer or member in manner aforesaid, whether such member or officer respectively be party to such actions, suits, or proceedings, as plaintiff, pursuer, petitioner, or defendant or defender, shall have the same effect against the property and effects of such company or body, and also (to the extent hereinafter mentioned) against the persons, property, and effects of the individual existing or former members thereof respectively, as if such judgments, decrees, interlocutors, or orders had been obtained against such company or body in suits or proceedings to which all the persons liable as existing or former members of such company or body had been parties, and that execution or diligence, or executions or diligences, shall be issued thereon accordingly: Provided, nevertheless, that where the extent per share of the liability of the individual members shall have been limited by any letters patent as aforesaid, no such execution or diligence shall be issued against any such individual

existing and former member of such company or body as aforesaid for a greater sum than the residue, if any, of the amount for which, by virtue of such letters patent as aforesaid, such individual member shall be liable in respect of the share or shares then or theretofore held by him in the said company or body, after deducting therefrom the amount, if any, which shall appear by such register as aforesaid to have been advanced and paid in respect of such shares or any of them by himself or herself, or any previous or subsequent holder of the same shares or any of them, or the representatives of any such holder, under or by virtue of any former execution or diligence, and not repaid at the time of issuing such subsequent execution or diligence.

25. And be it enacted, that the bankruptcy, insolvency, or stopping payment of any officer or member of such company or body in his individual capacity, shall not be construed to be the bankruptcy, insolvency, or stopping payment of such company or body; and that the property and effects of such company or body, and the persons, property, and effects of the individual members or other individual members thereof (as the case may be), shall, notwithstanding such bankruptcy, insolvency, or stopping payment, be liable to execution or diligence in the same manner as if such bankruptcy, insolvency, or stopping payment had not taken place.

26. And be it enacted, that in all cases wherein it may be necessary for any person to serve any summons, demand, or notice, or any writ or other proceeding at law or in equity, or otherwise, upon the said company or body, service thereof respectively on the clerk of the said company or body, or by leaving the same at the head office for the time being of the said company or body, or in case such clerk of the said office shall not be found or known, then service thereof on any agent or officer employed by the said company or body, or by leaving the same at the usual place of abode of such agent or officer, shall be deemed good and sufficient service of the same respectively on the said company or body.

27. And be it enacted, that in all cases wherein it may be necessary for the said company or body to give any summons, demand, or notice of any kind whatsoever to any person or corporation, under the provisions or directions contained in this act, such summons, demand, or notice may be given in writing, signed by the clerk, attorney, or solicitor for the time being of the said company or body, without being required to be under the common seal of the said company or body.

therein, or by death or otherwise, shall be considered for all purposes of liability as continuing a member of such company or body until a return of the transfer or other fact whereby he shall have so ceased to be a member shall be registered pursuant to the provisions hereinbefore contained.

22. And be it enacted, that no action, suit, or proceeding, whether civil or criminal, commenced either by or against any such company or body (whether in the name of one of the officers appointed to sue and be sued as aforesaid, or of some member of such company or body, in the case and in manner aforesaid), shall be abated or prejudiced by the death or by any act of such officer or person, or by the resignation or removal of such officer, either before or after the commencement of such action, suit, or proceeding, or by any change in the members of such company or body by the transfer of shares or otherwise, but that the same shall be continued in the name of such officer or member (as the case may be) notwithstanding such death or act, or such resignation or removal, and notwithstanding such change in the members of such company or body.

23. And be it enacted, that in all such actions, suits, and other proceedings, whether civil or criminal, the evidence of any such officer as aforesaid, or of any member of such company or body, shall be admissible in the like manner as if such officer or member were not an officer or member of such company or body.

24. And be it enacted, that all judgments, decrees, interlocutors, and orders obtained in any such actions, suits, or other proceedings as aforesaid against such officer or member in manner aforesaid, whether such member or officer respectively be party to such actions, suits, or proceedings, as plaintiff, pursuer, petitioner, or defendant or defender, shall have the same effect against the property and effects of such company or body, and also (to the extent hereinafter mentioned) against the persons, property, and effects of the individual existing or former members thereof respectively, as if such judgments, decrees, interlocutors, or orders had been obtained against such company or body in suits or proceedings to which all the persons liable as existing or former members of such company or body had been parties, and that execution or diligence, or executions or diligences, shall be issued thereon accordingly: Provided, nevertheless, that where the extent per share of the liability of the individual members shall have been limited by any letters patent as aforesaid, no such execution or diligence shall be issued against any such individual

existing and former member of such company or body as aforesaid for a greater sum than the residue, if any, of the amount for which, by virtue of such letters patent as aforesaid, such individual member shall be liable in respect of the share or shares then or theretofore held by him in the said company or body, after deducting therefrom the amount, if any, which shall appear by such register as aforesaid to have been advanced and paid in respect of such shares or any of them by himself or herself, or any previous or subsequent holder of the same shares or any of them, or the representatives of any such holder, under or by virtue of any former execution or diligence, and not repaid at the time of issuing such subsequent execution or diligence.

25. And be it enacted, that the bankruptcy, insolvency, or stopping payment of any officer or member of such company or body in his individual capacity, shall not be construed to be the bankruptcy, insolvency, or stopping payment of such company or body; and that the property and effects of such company or body, and the persons, property, and effects of the individual members or other individual members thereof (as the case may be), shall, notwithstanding such bankruptcy, insolvency, or stopping payment, be liable to execution or diligence in the same manner as if such bankruptcy, insolvency, or stopping payment had not taken place.

26. And be it enacted, that in all cases wherein it may be necessary for any person to serve any summons, demand, or notice, or any writ or other proceeding at law or in equity, or otherwise, upon the said company or body, service thereof respectively on the clerk of the said company or body, or by leaving the same at the head office for the time being of the said company or body, or in case such clerk of the said office shall not be found or known, then service thereof on any agent or officer employed by the said company or body, or by leaving the same at the usual place of abode of such agent or officer, shall be deemed good and sufficient service of the same respectively on the said company or body.

27. And be it enacted, that in all cases wherein it may be necessary for the said company or body to give any summons, demand, or notice of any kind whatsoever to any person or corporation, under the provisions or directions contained in this act, such summons, demand, or notice may be given in writing, signed by the clerk, attorney, or solicitor for the time being of the said company or body, without being required to be under the common seal of the said company or body.

28. And be it enacted, that in case of the determination of such company or body, such company or body shall nevertheless be considered as subsisting, and to be in all respects subject to the provisions of this act, so long and so far as any matters relating to such company or body shall remain unsettled, to the end and intent that such company or body may do all things necessary to the winding up of the concerns thereof, and that it may be sued and sue under the provisions of this act in respect of all matters relating to such company or body.

29. And be it also enacted, that it shall be lawful for Her Majesty, her heirs and successors, in any charter of incorporation to be hereafter granted, to limit the duration thereof for any term or number of years, or for any other period whatsoever; and also in any charter of incorporation (whether in perpetuity or for any term or period), either by reference to this act or otherwise, to make the corporation thereby formed, and the officers and members thereof, subject to all of the provisions, liabilities, and directions hereinbefore authorized to be imposed on or required from any unincorporated company or body, or its officers or members, and also to confer on such corporation or its members and officers all the powers or privileges hereinbefore authorized to be conferred on any unincorporated company or body, or its officers or members; and all the powers, provisions, clauses, matters, and things hereinbefore contained in reference to unincorporated companies or bodies shall accordingly in such case, and so far as the same may be applicable, be considered to belong and apply to such corporation.

30. Provided always, and be it enacted, that nothing in this act contained shall authorize or be construed to authorize Her Majesty, her heirs and successors, by any such letters patent, to exempt any company or body of persons associated as aforesaid from the necessity of entering into a deed of partnership, from making the return of the patent to the enrollment office of the Court of Chancery, from the necessity of carrying into execution the provisions of this act in respect to change of name or style of the company or body associated in respect to the cessation, or to the addition or to the change of names of any of the individuals of the company, or to the transfer of shares and to the notices to be given thereof, or to the payment of any sum by any shareholder on account of any preferment against such company or body, or to the returns to be made to the enrollment office of such payment, or of the repayment thereof, or from making

a return to the said office of the name of the officer appointed by said company to sue and be sued on its behalf, in case of the death, resignation, or removal of the one registered, or to exempt any company or body so associated from the provisions of this act in relation to the period at which its several members shall become entitled or shall cease to share in the profits thereof, the whole as required by the provisions of this act.

31. Provided always, and be it enacted, that nothing in this act contained shall authorize or be construed to authorize the grant to any company or body of persons of any privilege in derogation of any exclusive privileges now enjoyed by any company or corporation under any act or acts of Parliament.

32. And be it enacted, that whenever an application shall be made to Her Majesty to grant letters patent or a charter of incorporation to any company or body of persons associated together for any purpose of trade, and such application shall have been referred by Her Majesty to the Committee of Privy Council for Trade and Plantations, then, before any report shall be made to Her Majesty, and before any such letters patent or charter shall be granted, notice of such application shall be inserted by the parties applying three several times in the London Gazette, and in one or more of the newspapers circulating within the county in which it is proposed that the principal place of business of such company shall be established, at intervals of not less than one week.

No. XIX.

Kinder v. *Taylor*.

Lord Eldon said, that, though attention was due to what was the construction of the 6 Geo. 1, it ought never to be forgotten that there was a common law as well as a statute. He was very ready to admit that the statute 6 Geo. 1 was an ill-drawn act of Parliament. The recital clause jumbled together things in such a manner, that it was not certain what was, or what was not intended to be settled. Whenever that act came to be considered, he should wish it to be argued upon the effect of the recital, which took it for granted that there were some companies so prejudicial to the country, as to be manifestly objectionable; and the question was, whether cases of that

kind were to be left entirely to the decision of a jury, or whether the judges were not to pronounce their opinion of the law upon them, as in other cases. It was also to be considered, from the recital clause, whether the assuming to act as a corporation, independently of opening books and subscriptions, was not an offense under the act. Looking at the exceptive clauses of the act, it was impossible not to observe that chartered and acknowledged companies were contemplated, and that the Legislature excepted them from penalties, if they called for money by opening books. In 1720, the practice was to open books one day, and to shut them the next. He hoped that such practice was not followed in 1825. He hoped, in the present day, the public were not so deluded. His opinion might be of use to nobody, but it was as well that the world should know it. If no value were put upon his notion of the law, it perhaps might not be the worse for knowing it. That opinion was, and he had taken some trouble to consider the question, that if it could satisfactorily be made out to a jury, that a party was opening books, raising a premium upon the shares, and then took care to get himself out of the scrape, that was an indictable offense. The next question was, and it was one of very deep importance, whether such companies as these to which he had alluded, were or were not tending to the grievance of his Majesty's subjects, and injurious to the public credit? He would first consider the first point, whether they were tending to the grievance of his Majesty's subjects, and injurious to the laudable endeavors of individuals, working for the benefit of themselves and families; whether it was consistent with public policy thas such combinations were suffered to exist, taking away from individuals the power of exercising themselves in trade and commerce. It was the duty of the Legislature to consider that the public ought to be protected. Perhaps it might be of little consequence that our ancestors struggled so strenuously against the powers of the Crown to grant monopolies; for, in the present day, it was in the power of individuals to monopolize when and where they pleased—to monopolize not only in the gold mines of Mexico, which, for anything he knew, might be useful enough, but in every article of consumption; and the time seemed to be approaching when people would neither be allowed to eat, drink, or wear clean linen except upon the terms these companies saw fit to impose. He would then ask, whether it was consistent with public credit that matters should remain in this state? It might be worth considering, in the event of pecuniary difficulties in which this coun-

try might be involved, and in the event of a clashing of the interests of these companies and those of the country at large, how far this state of things would be allowed to continue. He would repeat, that, in the argument (if it ever took place) upon this act of Parliament, it should never be forgotten that there was a common law, and if the act was to be contended to destroy the common-law remedy, the question then would be, whether such a construction was not at variance with every sound and legal principle of justice?

INDEX.

A.

ABANDONMENT: Page.
advantage of evidence of, in certain cases..... 857

ABATEMENT:
objection of non-joinder must be plead in, when..... 1030
plea in, for non-joinder only avails when plaintiff ought to have joined others, not simply because he might have done so..... 1070
suit does not abate by death of partner..... 1068
plea in..... 1086, 1087
See ACTIONS.

ABSCONDING:
of partner, ground for dissolution..... 149 *et seq.*

ACCEPTANCE:
of bill of exchange must be in firm name..... 692, n. 695

ACCOMMODATION NOTE:
firm liable on for, given by one partner, to innocent holder..... n. 644
not liable for, to one who takes with notice..... n. 644

ACCORD AND SATISFACTION:
as defense to bill for accounting..... 463

ACCOUNT:
one partner cannot convert open, into interest bearing, after dissolution..... n. 170
clause providing for annual..... 296
general, upon dissolution..... 297

ACCOUNTS:
keeping proper books of..... 293
errors in, may be stipulated against..... 297
duty of partner to keep..... 266, 293

ACCOUNTING:
one partner may file bill for..... 15
must establish partnership as condition precedent to right to..... n. 51
when joint purchasers not entitled to..... 36, 37
between partners.....
right of partners to..... 442

ACCOUNTING — *Continued.* Page.
usually consequent on dissolution ... 430
accounting without dissolution ... 431, 433, 442
contrary rule in Loscombe v. Russell ... 431
when an account will be decreed ... 442
executors of deceased partners entitled to an account ... 443
sub-partner has no right to an account from the firm ... 443
rights of creditors and legatees of deceased partner ... 444
limited account without dissolution ... 444
instances in which limited accounts may be had ... 445
who may seek an accounting ... 450
what must appear in bill for ... 450
what defendant partners must do ... 451
relative to production of books, etc ... 453
who is entitled to inspection of ... 454
of defense to bill for accounting ... 455
denial of partnership ... 455
statute of limitations ... 456
account stated ... 460
award ... 463
payment and accord and satisfaction ... 463
release ... 463
of the decree ... 464
just allowances, what are ... 465, 540
period over which account extends ... 465, 471
evidence on which accounts are to be taken ... 472
outlays and advances ... 473
liability for useless outlays ... 474
outlays not chargeable if particulars refused ... 475
of debts, liabilities and losses ... 476
partners not always bound to contribute to losses ... 476
must contribute to loss from *bona fide* act ... 477
guilty of fraud or bad faith loss must be borne by partner guilty of ... 478
firm responsible for losses from wrongful acts of servants, though employed by one partner ... 478
unauthorized act, neglect or fraud of partner ratified by firm ... 479
when all are in *pari delicto* ... 482
firm liable for illegal acts of partners ... 480
doctrine denying contributions as to wrong-doers does not apply to partners ... 480
of interest ... 482
of division of profits and dividends ... 483, 486
foundation of right to contribution ... 486
of right of agent to indemnity from principal ... 487
agent who executes orders ... 488
acting without instructions ... 488, 489
of right of partners to indemnity ... 491, 495
when an accounting will be decreed ... 495 *et seq.* n. 495
of the payment of partnership money into court ... 497
stated, need not be signed to ...
support, plea of ... 461

ACCOUNTING — *Continued.* Page.
long possession of, effect of..... 461
action of..... 481 *et seq.*
under decree, may be for profits made contrary to articles..... n. 3, 259
is generally consequent on dissolution..... 480 *et seq.*
generally will not be decree unless there has been, or dissolution is asked for..... 481 *et seq.*
partner seeking, must pay money borrowed as private loan, into court. 497
need not pay partnership money into..... 497 *et seq.*
unless he admits himself indebted to that extent..... 497 *et seq.*
or has received it contrary to good faith..... 497 *et seq.*
but admission must be by answer unless affidavits are filed..... 497 *et seq.*
when defendant must pay money into court..... 498
when money in hands of partner is debt to the firm..... 499
interest on profits, in hands of partner..... 542
of sale under a decree..... 501
when firm is dissolved by bankruptcy or death..... 501
rule in Crawshay v. Collins..... 502
rule in Featherstonhaugh v. Fenwick..... 502
rule in Wilson v. Greenwood..... 503
rule in Cook v. Collingridge..... 503
rule upon dissolution of partnership at will..... 505
practice, when an account is decreed..... 505
under decree for, parties examined..... 505
how examination of parties conducted..... 505
parties must generally produce books..... 505
must be taken according to the method prescribed by the article. 506 *et seq.*
from what time will be reckoned..... 506
must be taken according to Clayton's case, where..... 506
what necessary to be considered in taking..... 520
what may be considered subject of sale and..... 520
real and movable property..... 520
good-will..... 521
outstanding contracts, etc..... 526
by remaining partners continuing to trade with the partnership effects. 528
by surviving partners..... 532
by solvent partners..... 532
between solvent partners and assignees, must be settled on the footing of the respective shares, though at the bankruptcy the proportion of the shares was altered by advances..... 529
on death of a partner, may be taken in a suit for the administration of the effects of one..... 533, 539
must be rendered by executor partner of his debt..... 540
must include allowances fixed by agreement..... 540
whether may include an allowance for treating customers, *quære*..... 540
may, after inquiry directed, include allowance for specific loss..... 540
how far may include interest..... 542
how the accounts must be taken when provision is made therefor in the contract..... 506, 509; also, n. 3, p. 506 *et seq.*
when no provision therefor is made in the contract..... 508
how the account is to be taken generally..... 510, n. 506, n. 518

ACCOUNTING — *Continued.* Page.
matters to be considered in taking ... 516, 521
how the value of the joint property is to be arrived at ... 521
good-will, value of, how ascertained ... 521
what is treated as firm property ... 522, n. *et seq.*
rule when remaining partners continue the trade ... 522, n. 528
right of assignee of bankrupt partner to share of profits ... 529
allowances for skill and services of surviving partners ... 532
survivors' rights and powers ... 533
dissolution by bankruptcy, accounts how taken ... 538
rights of executors of deceased partners ... 535
dissolution by death of partner ... 539
when copartner is made executor ... 540
interest on profits in the hands of a partner ... 542
costs ... 544
partners entitled to allowance for expenses in business ... n. 507
for debts paid by each partner ... n. 508
principles upon which accounting is based ... n. 506
——— ... n. 518
for debts due him from firm ... n. 509 *et seq.*
when action for, will be sustained ... n. 506, n. 518
distribution of capital on dissolution ... n. 518
bill for, lies when ... 614
may be plead or relied on in the answer ... 462
must be in writing ... 461
need not be signed ... 461
rendition of account does not prevent necessity of taking under direction of court ... 461
to have such effect, must have been acquiesced in ... 461
accounts of companies rendered and approved can only be impeached, when ... 461
stated account may be impeached in part or *in toto* for fraud ... 461
will be opened when is fraud or mistake ... 461
will be opened *in toto* for fraud ... 461
but not for mistake ... 461
leave to surcharge and falsify will be given, when ... 461
effect of lapse of time ... 461
impeached for errors, particular errors must be stated and proved ... 462
in surcharging and falsifying any errors of law, as well as of fact, may be rectified ... 462
leave to one to falsify, is leave to all ... 462
in cases where releases have been executed, accounts will not be opened until releases are set aside ... 462

ACCOUNT STATED:
as defense to bill for accounting ... 460

ACT OF BANKRUPTCY. See BANKRUPTCY.

ACTIONS:
in, brought by partners, must prove the partnership ... n. 15
at least if denied ... n. 15

ACTIONS — *Continued.* Page.
defendants in, may, under general issue, disprove partnership..... n. 15
all must join..... n. 15
death of partner after suit brought does not abate..... n. 15
surviving partner may bring in his own name..... n. 15
by partners, should be by individual names..... n. 15
may be in name of firm in some States..... n. 171
cause of, cannot be created by partner, after dissolution..... n. 171
except as to those not having notice or knowledge of dissolution.... n. 171
by firms must be in names of the several partners..... n. 289
instances in which one partner may sue firm..... n. 332, n. 339
when he may not..... n. 339 *et seq.*
right of, survives to covenantees..... 350
rule as to parties to..... 362, 363, 366–368, 370–372
at law, between partners, will be restrained when..... 560
by partners..... 1004–1046
as to firms having common member..... n. 1005
actions between partners at law..... n. 1006
in equity..... n. 1006
on specialties..... n. 1010
on bills and notes..... n. 1010, 1017
on contracts generally..... n. 1011
on implied contracts..... n. 1012
on written contracts..... n. 1012
when one may sue alone..... n. 1013
when one should sue alone..... n. 1013
when all must join..... n. 1012
dormant, need not join..... n. 1012, 1020
who should sue in actions *ex delicto*..... n. 1014, 1028
in case of joint damage..... n. 1014
in case damage is not joint..... n. 1014
actions for libel..... n. 1014, 1028
actions for goods, or loss of, or injury to..... n. 1015
judgment may be given when one sues alone for damages to his interest, unless the misjoinder is plead in abatement..... n. 1015
after such judgment, each of the others may sue, and misjoinder cannot be plead..... n. 1015
who may sue third person colluding with one partner..... n. 1015
all should join in action of ejectment..... n. 1015
one making lease in his own name, may sue thereon in his name... n. 1015
nominal partner need not join, except..... 1023
infant partners must be joined..... 1024
rule when one partner is bankrupt..... 1025
rule when one partner is dead, also..... n. 3. 1026
in what cases the power of bringing, not co-extensive with that of individuals..... 982
where there are two firms and a common member..... 983
where the injury arises from fraud committed by the defendant jointly with one of the plaintiffs..... 1005
where the contract made by one partner only, without the knowledge of his copartners, is illegal..... 1008

ACTIONS — *Continued.* Page.
may be brought here, though they could not abroad 1008
must be brought generally, by all who were partners at the time of contract 1009
covenantees 1009
joint-owners of a fund ..... n. 4, 1009
payees 1009
but by such only as were partners at time of contract .....
therefore not incoming partner, unless the old contract be extinguished 1015
and where contract in writing, by such only as were parties to the contract 1015
always in deeds 1016, 1019
generally in unsealed contracts .....
as bills of exchange 1017
with exceptions— .....
guaranty 1017
policy of insurance 1017
bill indorsed in bank 1018
where partner admitted as from a previous day 1019
where contract is severed 1019
where one possesses an office 1020
by dormant partner 1020
nominal partner 1023
infant partner 1024
solvent partner 471
surviving partner 1025
does not abate by death pending the action 1026
how defect of parties is remedied 1026
how misjoinder of parties remedied 1026
actions *ex delicto*, ought to be brought by all jointly on joint damage .. 1027
or by part jointly, where part are jointly damaged 1027
on death of one must be brought by surviving partner 1029
no nonsuit in, for defect of plaintiffs 1029
except where the action is substantially founded in contract ... 1039
where may be brought severally, by each partner 1029
declaration in, how should describe plaintiffs. 1031
joint interest in, should appear in the declaration 1031
declaration in, to recover the amount of goods, should state the goods as of the partnership 1031
on policies of insurance, declaration in ..... 1032 *et seq.*
for libel, declaration in 1034
defendant may plead in bar all matters in confession and avoidance ... 1035
illegality of partnership 1035
that the premises were made jointly by plaintiff and defendant ... 1035
bankruptcy of a co-plaintiff 1035
release by one partner 1035
tender to one partner 1036
Statute of Limitations 1036
See EVIDENCE, also 1036, *et seq.*
indictments by partners 1043

ACTIONS — *Continued.* Page.
equitable remedies, against 1044
actions *ex contractu*, all must be made defendants to, who were partners at the time of the contract 1055
but the omission of a co-defendant to, can only be taken advantage of by plea in abatement. 1057
unless the defect appear on some pleading of the plaintiff; when defendant may demur 1057
move in arrest of judgment 1057
sustain a writ of error 1057
plaintiff in, may give evidence of a joint contract by all, though some only are made defendants, where no plea in abatement 1064
cannot, however, in such case set forth the joint contract by all, in the declaration 1064
if he do, it is error 1065
whether the joint contract will appear on the declaration by omitting to show that a contractor is dead ..... 1064 *et seq.*
will not appear by omitting to state that he sealed 1065
non-joinder of dormant partner as defendant to, cannot generally be pleaded in abatement 1065
where dormant partner should be defendant to, and where not 1066
may be brought against dormant partner only 1066
ought not to be brought against a partner who was an infant at the time of the contract 1067
nor against bankrupt partner who has obtained certificate 1068
against the surviving partners, after death of one 1068
against the executors of last surviving partner 1068
against those who appear after the outlawry of the others 1069
misjoinder of defendants to, how to be taken advantage of 1069
actions *ex delicto*, may be brought against all or any of the partners... 1070
and no advantage can be taken by plea in abatement 1070
secus as to actions involving real property 1071
misjoinder of defendants to, how to be taken advantage of 1071
actions *ex quasi contractu*, against what parties to be brought in the case of carriers 1071
if declaration states a special contract, plea in abatement allowed . 1071
if no contract stated, any of the contractors may be sued ..... 1071 *et seq.*
in case of land carriers; this provided for by statute 1071
against what parties generally ..... 1074 *et seq.*
declaration in, must be joint upon joint process, where bailable 1076
may include demands against defendant as surviving partner and as solely liable 1080, 1083
need not describe the survivor as such 1083
what counts may be joined in, where one partner has become bankrupt 1085
pleas in abatement. *See* ABATEMENT; PLEADINGS.
pleas in bar, special plea to, frequently necessary 1091
release may be pleaded to, whether actions of debt on bond, or assumpsit 1091
covenant not to sue, cannot be pleaded as release to 1094
plea of payment to 1095

ACTIONS — *Continued.* Page.
tender ... 1095
former recovery ... 1096
set-off ... 1097 *et seq.* and notes.
infancy ... 1106
bankruptcy ... 1107
when generally, under the statute ... 1107
when specially ... 1107
when *puis darrein continuance* ... 1107
for joint tort, release to one, good plea in bar ... 1107
may be discharged by *nolle prosequi* where ... 1107
defense to, may be severed ... 1108
to enter into partnership will be specially enforced when, 375 *et seq.*, 389 *et seq.*
will not be enforced when agreement is for partnership at will ... 376
action for damages for breach of, lies in such case ... 376, 378
how enforced when contract is under seal ... 378
motions for injunction, before ... 578
defendant submitting to, must answer fully ... 620
of defendant residing abroad ... 621
requisites of, in several cases ... 621
general right of, to sue ... 1004, n. 1024
of parties to actions *ex contractu* ... 1009
must have been partnership when contract was made ... 1013
distinction between, or specialties and simple contract ... n. 1010, 1017
right of, cannot be transferred ... 1018
of parties to, see PARTIES.
declaration in ... 1031
pleadings in ... 1035–1036
against partners ... 1045–1060
of the process ... 1045
personal service necessary ...
one partner may appear for all ... 1048
distringas ... 1049
return of *nulla bona*, or *non est inventus* ... 1050
when defendant is abroad ... 1050
separate property of one cannot be distrained to compel appearance of the other ... 1051
as to bailable process ... 1051
full name of defendant shall be given ... 1053
must be jointly declared against ... 1054
in case of tort ... 1054, n. 1058
on bail bond ... 1054
of parties to action on contract ... 1055, also n. 2, n. 1062, n. 1077
non-joinder must be plead ... 1057
separate contract may be declared on, and joint contract proved when ... 1064
when non-joinder may be availed of, although not plead ... 1065
non-joinder of dormant partner ... n. 1066
of infant partner ... 1067
of bankrupt partner ... 1068
when one is dead ... 1068
outlawry of one ... 1069

ACTIONS — *Continued.* Page.
when too many are joined ... 1069
of parties to action for torts ... 1070, n. 1079
of parties to actions *ex quasi contractu* ... 1071
other actions *ex quasi contractu* ... 1075
all partners must be sued ... 1076
actions against survivor ... 1080
should be declared against, as survivor ... 1083
actions against the firm, generally ... n. 1055
when a change in the firm has transpired ... n. 1058
changes caused by death ... n. 1060
changes caused by bankruptcy ... n. 1060
surviving partners ... n. 1060
extent of liability ... n. 1080
of the pleadings in ... 1086, 1108
of pleas in abatement ... 1086
for misnomer ... 1087
plea should be accurate and certain ... 1087
plea for non-joinder; what must be stated in ... 1088
how must conclude ... 1088
plaintiff not allowed to amend ... 1088
demurrer to plea ... 1089
when plaintiff should reply to plea ... 1089
effect of finding under issue raised by plea and replication ... 1090
of pleas in bar, nature of ... 1091
release ... 1091
covenant not to sue ... 1094
payment or tender ... 1095
former recovery ... 1096
joint and several debts ... 1097
set off ... 1097, also n. 8
torts cannot be set off ... 1103
must be debts due in same right ... 1103
enough, if rights are essentially the same ... 1104
demands are essentially separate ... 1105
effect of agreement to sever ... 1105
court will sometimes order judgments to be set off ... 1106
infancy, plea of ... 1106
bankruptcy ... 1107
joint tort ... 1107
when defense is joint ... 1108
nonsuit in, by or against partners ... 1135

ADMINISTRATORS. See EXECUTORS.

ADMISSIONS:
of one partner not evidence against others ... n. 77
when admissible ... n. 12, n. 77, 676
effect of ... 709, 710
of partners, as evidence to prove partnership ... 1040, n. 1041, n. 1133, 1117

Page.

ADOPTION:
of separate debt of one partner by firm ... 803

ADVERTISEMENTS:
admissible to prove partnership ... n. 11, n. 113
sale, inducing person to enter partnership, action for ... n. 329

ADVANCES:
made to buy property, for share of profits ... n. 66

AGENCY:
of partners, revoked by dissolution ... n. 170
principles of, applicable as test of liability as partner ... 44

AGENT:
not liable as partners ... n. 49, n. 51
illustration, Berthold v. Goldsmith, 49 n.; Burckle v. Elkhart. n. 49, n. 51
participating in profits for services, not partner ... n. 73
of firm, dealing with, knowingly, in excess of his authority ... n. 78
each partner is, for his copartner ... 269, 641–654
acts of one who assumes to act for firm, binds when ... n. 649
each partner is, for firm ... 657
firm bound by acts of ... 674

AGREEMENTS:
in writing, as evidence of partnership ... n. 1113
between partners, not binding on third persons ... 629

ALIEN ENEMY:
partnership for trading with illegal ... n. 104
between alien ami, becomes void, on breaking out of hostilities. n. 23, n. 24

ALIEN FRIENDS:
may be partners ... 23
rule when hostilities break out ... n. 23, n. 24

ANNUITY:
receiving interest or, does not create partnership ... 95
cases illustrating ... 96–103

ANSWER:
in chancery, to prove partnership, admissible when ... n. 1113

APPRENTICE:
to firm, discharged by change therein ... n. 291

ARBITRATION:
covenants to refer disputes to, effect of ... 342
clause of, in contract ... 302–304
one partner cannot submit to ... n. 303
award, action lies upon when ... 404
award under, as defense to bill for accounting ... 462, 626
one partner cannot consent to submission to, by order of court ... 669
one partner cannot submit to ... 713, 762
what submission to, covers ... 990

ARTICLES OF PARTNERSHIP. See APPENDIX.
forms for ... 1513

ASSENT: Page.
of firm to payment of debt of one partner out of firm property, may be established, how ..... n. 795

ASSIGNEE:
of a note payable to partner, cannot sue firm thereon ..... n. 323
of partner will be restrained from interfering with firm business. 558, 573
in bankruptcy, may bring bill for an account, when 612

ASSIGNMENT:
by partner or firm dissolves partnership ..... n. 151, 161, n. 162
one partner cannot make, after dissolution 172
holding that, may assign demands for payment of firm debts, see 172, n. 3
one partner may make, when ..... 654, n. 655

ASSUMPSIT:
lies between partners, when 399
See REMEDIES.

ATTACHMENT:
of interest of member of firm, ground for dissolution ..... n. 162
See EXECUTION.

ATTORNEY:
doing business as, for share of profits, no ..... n. 83
See LAWYERS.

ATTORNEYS:
dissolution of firm between, effect as to clients ..... n. 423

AUTHOR:
will be restrained from advertising that publication will be discontinued, when 572

AUTHOR AND PUBLISHER:
not liable as partners, because they share in profits 311

AUTHORITY:
person bound by notice or knowledge of ..... n. 63
dealing as to matters beyond apparent scope of ..... n. 63

AWARDS. See ARBITRATION.

B.

BALANCES:
agreed upon, one partner may sue for ..... n. 326–n. 340, 403, 405

BANKRUPTCY:
one partner may bind firm by petition in, against creditor 669
of one partner or firm dissolves partnership .... n. 151
as defense to bill for accounting 620
of firm, operates to revoke power of each partner ..... n. 844, 886
powers of solvent partner ..... n. 844
proof in, against estate of one partner does not merge firm debt 924
plea of 1035, 1107
of the consequences of 1413
who are to be deemed bankrupts 1413
who are to proceed against 1415

BANKRUPTCY — *Continued.* Page.
when fiat is void ... 1416
what property passes to assignee ... 1416
effect of an act of solvent partner ... 1419, 1421
powers of solvent partner ... 1419, 1425
effect of acts of bankrupt partner on dealings of firm ... 1427
effect of bankruptcy of one, on execution against firm ... 1428
of joint and separate estate ... 1432
what is joint estate in bankruptcy ... 1433
ostensible partners ... 1434
dormant partners ... 1434
what is separate estate in bankruptcy ... 1437
when separate, is joint estate in bankruptcy ... 1439
joint estate converted into separate ... 1441
how joint estate may be converted into separate ... 1442
what is essential to make conversion complete ... 1444
all the terms of the contract must be complied with ... 1447
when conversion may be defeated ... 1448
conversion not defeated by knowledge of the firm that it was insolvent, 1448
creditors cannot prevent conversion ... 1448
separate debts, what are ... 1449
how separate debt is converted into joint ... 1451
what amounts to conversion, and how proved ... 1453
of proof in general. Priority of joint creditors as to joint estate of separate creditors ... 1458
exceptions to rule as to dividends with separate creditors ... 1459
when a joint creditor is a petitioner under a separate fiat ... 1459
where there is no joint estate and no solvent partner ... 1460
where there are no separate debts ... 1462
as to interest ... 1462
when partners may be creditors upon each other ... 1463
enforcement of joint debts, against whole of deceased partner ... 1463
of election of remedy ... 1464
confined to same debt ... 1465
confined to bonds, bills and personal securities ... 1466
of election of proof ... 1467
rule when debt has been converted with or without extinguishment ... 1470
when debt has been collusively converted ... 1471
rule when dormant and ostensible partners become bankrupts ... 1472
when a demand may be split ... 1472
of the time of elections and waiver of proof ... 1473
of double remedy ... 1476
of double proof ... 1479
limitations as to double proof ... 1481
of proof between partners ... 1484
qualification of the rule ... 1488
exceptions of a special nature ... 1489
what debts one partner may prove against separate estate ... 1491
when one partner may prove against separate estate, although not sufficient to pay separate debts ... 1492
rule as to distinct fines ... 1493

BANKRUPTCY — *Continued.* Page.
when there are no joint debts ... 1494
of proof between estates ... 1494
exceptions to rule ... 1495
rule when one partner is appointed manager of firm business ... 1497
rule when some of the partners form a distinct firm ... 1505
of set-off ... 1506
equitable set-off ... 1508

BILLS:
to customers, evidence of partnership ... n. 12, n. 1114

BILL FOR AN ACCOUNT. See EQUITY.

BILLS OF EXCHANGE:
admissible to prove partnership ... n. 12
as evidence to establish partnership ... n. 1114, 1115
cannot be indorsed or transferred by one partner after dissolution ... n. 170
even though authorized to settle up business ... 141
power of one to draw, etc ... 658
effect of power of attorney given by one to another to draw, etc ... 658
power of directors of companies to draw ... 658
one partner may transfer ... 659
to bind firm, must purport to be paper of firm ... 659
test of authority of one partner to bind firm by ... n. 686
acceptance of, in firm names *prima facie* on firm account ... n. 688
drawer in name of one partner, firm not liable on ... n. 692
acceptance must be in firm name ... n. 692, 695
drawn by one, not binding when ... n. 686–n. 688, n. 692, n. 699, *et seq.*
forms of execution in which forms have been held liable on ... n. 699, *et seq.*
instances in which they have been held not liable on ... n. 699, *et seq.*
fraudulently issued, liability of firm on ... 742
cases illustrating ... 743, *et seq.*
executed after dissolution, binding on firm when ... n. 844
executed by one of non-trading firm, not binding when ... n. 798
drawn by form for debt created before partnership began ... 821
drawn after dissolution, not binding when ... 854, 857
rule in Kilgour v. Finlyson ... 855
acceptance in old name ... 856
may give power to one to make, indorse or accept ... 856
rule as to acceptance in old name without special authority, Wrightson v. Pullan and Usher v. Dauncey ... 856
acceptance with reservation of all rights, Featherstone v. Hunt ... 866
security only to one to whom executed ... 996
proof of partnership, when ... 1115, n. 1121

BILL IN EQUITY. See EQUITY.

BOARDING-HOUSE:
leasing building as, for share of profits ... n. 53

BOAT:
sailing on shares does not create partnership ... 10, n. 37

BONA FIDE HOLDER: Page.
of note of non-trading firm, as physicians, lawyers, mechanics, etc., executed by one partner, cannot hold firm thereon unless... n. 793, *et seq.*

BOND:
one partner cannot bind firm by..... 665
binds himself..... 665
given to indemnify in illegal transaction, valid when..... 113
made by one, binding when..... 758
of partners..... 983–990
action on bail bond..... 1054
action on bonds generally..... 1035
taking of, from one, by creditor, releases firm when..... n. 1095

BOOKS:
of firm, who entitled to inspection of..... 454
production of, when will be ordered..... 458
of firm, partner will be restrained from withholding..... 557, 559
of firm, power of partner to dispose of..... 676

BROKER:
buying shares in illegal company cannot recover price of..... n. 107
See FACTORS AND BROKERS.

BUBBLE ACT:
history of..... 1200

BUILDING:
and machinery, furnished by one and worked by another, profits divided, creates partnership when..... 58; also n. 6
contrary rule..... 58, n. 1, n. 66

BUSINESS:
partners restricted from engaging in similar, when..... 293

C.

CAPITAL:
each member must contribute something to..... 25–27
skill and labor against money or stock..... 25–27
what is regarded as..... n. 26, 1
illustration by cases..... n. 26, 1
may be partnership without other than skill or labor..... n. 34
stock against labor does not necessarily create partnership..... n. 34
against services creates partnership when..... 74–84
when it does not..... 74–84
neglect to furnish, as agreed, good cause for dissolution..... n. 163
left in business by retiring member, entitled to profits on..... n. 187
action lies upon failure to perform agreement to furnish..... n. 332

CARDS:
with names of persons as partners admissible to establish partnership..... n. 11

CARPENTERS:
one of firm of, cannot bind copartner by note unless..... 687

CARTS: Page.
running, with names of persons painted thereon as partners, evidence of partnership..... n. 11

CHANCERY. See EQUITY.

CHARTERED COMPANIES:
rule relating to..... 1266

CIRCULARS:
admissible to prove partnership..... n. 12, n. 1114

CIVIL LAW:
partnership regarded as mixed contract..... n. 3
rule as to surviving partners, derived from..... 4

CLERKS:
of a firm, evidence of, as to partnership..... n. 12

CLUBS:
members, managers, etc., of, liable as partners, when.... ... 44, 73, n. 112
rules applicable to..... 46

COMMENCEMENT:
of partnership..... 286
of partnership..... 804–n. 806, *et seq.*; n. 816, *et seq.*, 825
how may be proved..... n. 804
time when joint liability begins..... 818, 825
when time is fixed in contract, contracts unless..... 804, n. 806
liability does not exist for debts created before partnership began, 804, *et seq.* n. 826
when firm may be charged for goods ordered before..... 805
when contract fixes on future time, to commence, parties to, may be liable for debts created before time arrives, when..... n. 806
supply of goods to one, or loan of money to..... 819
Smith v. Craven..... 820
of liability as partners..... 825, *et seq.*
firm as such, not liable for debts created before..... 826
rule in Wilson v. Whitehead..... 826
Saville v. Robertson..... 827
Gouthwaite v. Duckworth..... 827

COMMON LAW:
divisions of partnership under..... n. 4

COMMERCIAL PARTNERSHIP:
notes of, given by one partner fraudulently, binding in hands of *bona fide* holder... ..... n. 793
presumed that all notes of, were given on account of firm..... n. 793

COMMISSION:
on profits, receiving, effect of..... n. 10, n. 81

COMPENSATION:
interest in profits as, for services does not create partnership... n. 77–n. 84
cases illustrating..... n. 77–n. 84
share of profits received as measure of, does not create partnership .. 90–93
cases illustrating..... 90–93

COMPOSITION DEED: Page.
treated as release ... 975
may be limited to one partner ... 975

CONSENT:
mutual, partnership dissolved by ... n. 151

CONSTRUCTION:
of contract of partnership, how far acts of parties affect ... 286
nature of business as aid to ... 283
See CONTRACTS.

CONTRACT:
of partnership, must be voluntary ... n. 8
regarded as mixed contract by civil law ... n. 8
may be by parol ... n. 11
form of, when in writing ... 1513
equity will not decree performance of, to compel admission of stranger into firm ... 18
provision in, for admission of stranger valid ... n. 19
assent to admission of, may be implied ... n. 19
equity will decree performance of, as between parties to ... n. 19
of partnership must be voluntary ... 16
stranger cannot be admitted into firm except ... 16
person filing bill for account must prove that he is a partner ... 16–17
gives persons right of action as partners ... 15
also right to file bill against his copartners for an accounting ... 15
between parties, profits to be shared, does not create partnership, when ... n. 68–n. 84
cases illustrating ... n. 78–n. 84
partner cannot enter into, for firm after dissolution ... n. 170, n. 171
may complete one entered into before ... n. 171
rights and obligations of partners under ... 274
when specific performance will be decreed ... 275
when continuous and profits uncertain ... 275
action at law for breach of ... 276
rule in Hercy v. Birch ... 276
when equity will enjoin dissolution ... 277
what must be established to maintain action for damages for breach of. 278
construction, rules of, Gainsborough v. Stark ... 279
acts of partners as affecting construction ... 280
nature of business ... 283
deviation from terms of, acquiescence in ... 296
when equity treats provisions of, as waived ... 296
clause for substitution, construction of ... 299
arbitration clause in, effect of ... 302
to be construed to effectuate intention of parties ... n. 282
under seal, liability of firm on ... n. 697
ordinary contracts ... n. 698
loan to, and security of one partner alone ... 767
cases illustrating ... 767
firm having benefit of contract does not render it liable thereon ... n. 770

CONTRACT — *Continued.* Page.
that one partner only has had benefit of contract, does not defeat liability of firm ..... n. 770
when regarded as several in law 766–784
where contract is executed in the name of the partner only 766
advancing money and taking security of partner 767
grounds on which liability rests 768
principle on which firm is charged ..... 769, n. 770
when loan to one partner becomes debt against the firm 771
rule in Ex parte Raleigh explained 773
creditor must have acted with due caution 774
where the contract in fact is made with the firm 775
rule in Denton v. Radie 777
contract with one partner 778
may bind firm as to matters arising out of its usual transactions 779
contract to take a part of the firm 780–783
contracts as affected by the custom of trade 783
joint and several in equity 924, 936

CONTRACTORS:
firm of, non-commercial 648
cannot bind each other by notes, except 648

CONTRIBUTION:
for losses 476–477
for outlays and advances 473
for useless outlays 474
when not allowed 475, 476, 478, 479, 482
foundation of right to 486
indemnity to agent from principal 488–491
for illegal acts of partners 480
rule denying contribution as to wrong-doers not applicable to partners .. 480
members of illegal firms not entitled to ..... n. 108, 113 *et seq.*
in stock-jobbing transaction, may be had when 113
contrary rule 114
cases illustrating ..... 114, *et seq.*
cannot be, between persons illegally engaged in insurance business ... 114
not entitled to, when loss results from negligence or fraud 269
right to at law, in certain cases ..... n. 334

COPARTNER:
rules applicable to, when executor of deceased partner 540

CORPORATION:
may be partners when 25
assuming to act as, without competent authority, not illegal at common law ..... n. 106

COST BOOK MINING CO.:
subscriber to, entitled to recover back his deposit when ..... n. 329
liable for purchases made by directors or manager 674
fact that goods are used by, effect of 674
as to 1263

COSTS:
Page.
ordered paid to one partner, not satisfied by payment to another..... 659
who entitled to..... 1187

COVENANT:
lies between partners when..... 332, n. 332
all the covenantees must be joined..... 348
when treated as several..... 349
when will be specifically enforced.....
against engaging in other business..... 341
as to liquidated damages..... 343–344
treated as joint and several in equity..... 345
illustration..... 345
clauses not acted on, rejected in equity..... 347
number of plaintiffs may be limited by..... 349–350
not to sue by one partner not a release..... 674, 977
otherwise when covenant is entered into by all..... 674
not to sue, plea of..... 1092
See ACTIONS.

CREDITORS:
persons holding themselves out as partners liable to..... 16
of one partner obtaining his share in firm under levy of execution, rights of..... n. 17, n. 19
what may be levied on..... n. 17
vendee, relation of, to firm..... n. 17
cannot charge person held out as partner unless holding out was known before debt arose..... 38
knowing real facts, cannot hold for debt..... 38–40
illustration, Alderson v. Pope..... 38
Fox v. Clifton..... 40–42
Patt v. Eyton..... 42
Newsome v. Cales..... 42
cannot charge person holding himself out as about to become partner.. 43
carrying on debtor's business, partners when..... 85, n. 92
execution in favor of firm creditor has preference..... n. 194 *et seq.*
of deceased partner, rights of, as to accounting..... 445
partners may give preference to..... n. 655
assignment for benefit of, may be made by one partner when..... n. 655
separate, have no claim against the firm..... 785
how, may acquire one..... 785
when claim is fraudulently acquired..... 785
receiving obligation of firm to pay private debt..... 785–n. 787
of one partner taking property of firm in payment acquire no title thereto unless..... n. 795
prima facie evidence of fraud..... n. 795
when such act is *bona fide*..... 795
of one partner, receiving partnership property for, what is evidence of collusion between..... 800, n. 801
when difference is paid by, liability of firm for..... 800
illustration of rule..... 801 *et seq.*
of firm may pursue firm property in equity, when..... n. 802
what acts of, releases part of firm..... n. 1095

CRIME: Page.
cannot be partnership for sharing profits of..... n. 104

D.

DAMAGES:
what must be shown to maintain action for, because of breach of partnership contract..... 278
liquidated..... 304
liquidated, covenants relating to..... 343 *et seq.*
when not applicable..... 344

DEATH:
of partner, firm *ipso facto* dissolved by..... n. 151
of partner, consequences of..... 949
of one partner after judgment, how execution must issue..... 1140

DEBTS:
of firm, each partner has lien on stock and funds for payment of..... 169
one partner cannot create, after dissolution..... n. 170
except as to those not having notice of dissolution..... n. 171
one partner cannot fix amount of, after dissolution ..... n. 171
lies for agreed balance..... 404

DECEASED PARTNERS:
estate of, not liable for acts of survivor..... 43
liability of, for firm debts..... 925–973
remedy at law..... 926, n. 935
rule in Gray v. Chiswell..... 927
partnership debts, several as well as joint, in equity..... 929
rule in Devaynes v. Noble..... 930
confirmed in Wilkinson v. Henderson..... 932
rule carried still farther in Thorpe v. Jackson..... 933
joint and several contracts..... 936
rule in equity when partners enter into a joint security..... 936
rule does not apply to all transactions—Sumner v. Powell..... 937
partnership creditors, rights against a deceased partner's estate—Vulliamy v. Noble..... n. 935, 938
admission of survivor of representatives of a deceased partner—Braithwaite v. Brittain—Winter v. Innes..... 939
subsequent dealings with the new firm..... 940
acts in discharge of deceased partner's estate—Jacomb v. Harwood.... 941
rule in Winter v. Innes..... 942
payments made in case of decease of one of the partners—Devaynes v. Noble..... 944
Sleech's case—Clayton's case..... 945
liability in case of continuance of firm under will of deceased..... 947
creditors of new firm not entitled to pursue the estate..... 947
Ex parte Garland..... 948
executor carrying on business liable for excess of authority..... 948
rule in Wightmen v. Townall..... 949
consequences of death of a partner..... 949
relative rights of executor and surviving partner..... 949, n. 950 *et seq.*
with reference to what occurred before death..... 954

DECEASED PARTNERS — *Continued.* Page.
creditors may pursue estate in equity ... 955
position of firm creditors as to individual creditors of deceased partner. 957
rule in Brett v. Beckwith ... 958
substance of decree in such cases ... 958
questionable whether both remedies can be pursued at once ... 960
with reference to what occurred after death ... 961
what acts of an executor impose liability upon assets of deceased partner ... 962
cases illustrating ... 963
effect of provision in will directing continuance of business ... 964
in the case of companies ... 965
consequences as to separate creditors, legatees and next of kin of deceased partners ... 966
general rule as to separate creditors ... 966
exceptions to the rule ... 968
when share of deceased is not got in ... 969–973

See EXECUTORS; SURVIVING PARTNERS.

DECLARATION.
in suits by partners ... 1031 *et seq.*
by surviving partners ... 1031
in action on guaranty made to one, for firm ... 1032

DECREE:
of dissolution, equity will grant when ... 151 *et seq.* and notes.
for taking partnership accounts will be made, when ... 442
limited, will be made when ... 444
against estate of deceased partner, substance of ... 958

DEEDS:
admissible to prove partnership ... n. 12
one partner cannot bind firm by ... 665, 666
one partner cannot bind firm by ... 755–757

DEFENSES:
to suits for an account ... 455
statute of limitations ... 456–460, 618
account stated ... 460, 617
award ... 462, 620
payment ... 463
accord and satisfaction ... 463
release ... 465, 620
denial of partnership ... 455, 621
illegality ... 104–n. 110
to bill for accounting ... 455–465, 618, 620

See ACCOUNTING.

DELECTUS PERSONÆ:
indispensable incident of partnership ... n. 17
stranger cannot be admitted into firm except ... 16, n. 19
assignee or vendee of one partner, position of, as to firm ... n. 17
personal representatives of deceased partner ... n. 17

DELECTUS PERSONÆ — *Continued.* Page.
exception when contract provides for continuance of business by . n. 17, n. 19
equity will not compel admission of stranger, though contract provides therefor 18

DELIVERY:
to one partner, delivery to firm ..... n. 649

DEMURRER:
to bill for accounting 616, 620
for want of parties 1026
because too many persons are sued 1069
to plea 1089
See ACTIONS.

DENIAL OF PARTNERSHIP:
effect of, in suit for account and discovery 455, 621

DIRECTORS:
and provisional managers of joint-stock companies, liability of 1223

DISCHARGE:
of one partner, discharge of all ..... 974, n. 978 *et seq.*
acts that discharge estate of deceased partner 941

DISCLAIMER:
of one partner, operative when ..... 631, n. 641

DISSENSIONS:
among partners, ground for dissolution, when ..... n. 149–n. 151
mere disagreements not enough ..... n. 149

DISSOLUTION:
of partnership, when *ipso facto* effected ..... 184, n. 151 *et seq.*
causes of ..... 149 *et seq.*
will of any partner, when ..... 148, 149 *et seq.*
for a term, *ipso facto*, by expiration of time of ..... n. 151
by mutual consent ..... n. 151, n. 155
by death of a partner ..... n. 151
by marriage of a *feme sole* ..... n. 151
by the bankruptcy of a partner or of the firm ..... n. 151
by reason of the business becoming unlawful ..... n. 151
by war, in certain cases ..... n. 151
by introduction of new member ..... n. 151
by withdrawal of a member ..... n. 151
by a general assignment of one partner, or the firm ..... 151, n. 162
by the sale of the entire interest of any member, in the firm .... 151, n. 162
by decree of a court of equity ..... 420–429, and note 1, 420
of the right to 420
by reason of misconduct of a partner ..... 151, n. 420, 427
attachment of interest of member 162
extravagance ..... 151, n. 420
embezzling funds of firm ..... n. 420
incapacity ..... n, 151, 426
negligence ..... 151, n. 420
absconding ..... n. 151

DISSOLUTIONS — *Continued.* Page.
felony ... n. 151
habitual intoxication ... 151, n. 420
dissensions between ... n. 151
incompatibility of temper ... n. 151
insanity of partner ... n. 152 *et seq.* 426
fraud ... n. 149, 428
gross violation of good faith ... 150, n. 420
immoral conduct ... 149
insolvency of firm ... 162
of time of ... 148
partnership at will, presumption as to continuance of ... 148
of the causes of dissolution ... 149
assignment by one partner or the firm ... 161
death of partner ... 164
retirement of one partner dissolves the firm ... 165
partnership for a term dissolved, how ... 166
effect of dissolution ... 169
powers of partner, after ... 169
of firm for a term, can only be dissolved by decree of court .. n. 157, 166, n. 421
of firm, however formed, may be dissolved by parol ... n. 163
notice of, how must be given ... 163–n. 164
as to former dealers with ... n. 163
actual notice not necessary ... n. 163 *et seq.*
of quasi partnership, can only be affected by express notice to former dealers and the world in general ... 168
single transactions, partnership in, is *ipso facto* dissolved when transaction is closed ... n. 157
effect of ... 169, n. 170 *et seq.*
powers of partners after dissolution ... 169, n. 170 *et seq.*
when will be enjoined ... 277
may be had because business has become impracticable ... n. 420, 422
because partners refuse to conduct business as agreed ... n. 421
equity may decree, *ab initio* in certain cases ... 420
a partnership for a term cannot be dissolved by one partner ... n. 421
in case of attorneys ... n. 423
deed of, must be specific as to time ... 304
equity will enjoin, when ... 277
rule as to parties to bill for ... 368
accounting between partners, usually consequent on ... 431
not necessarily, however ... 431 *et seq.*
firm bound by acts of partner after, as to those having no notice of. n. 642
and notice, effect of ... 888, 889
instances when notice does not protect ... 890
rights of partners after dissolution ... 892
what amounts to notice of ... 895
of partnership between members of joint-stock companies ...
right of member to retire. .. ...

DOMAT:
definition of partnership by ... 2

DORMANT PARTNERS: Page.
who are ... 11–16
liable for debts of firm ... 14
not necessary parties to suits for or against the firm ... 14
may be joined ... 14
need not give notice of retiracy from firm except as to ... 14
judgment against firm to which dormant partners are not parties may be levied on property of firm ... n. 14
when name of firm does not indicate who are partners, the partners are not dormant ... 15
illustration ... 16
liable though not known as ... 142
cases illustrating rule ... 142 *et seq.*
retirement of, from firm ... 887
rule in Heath v. Sansom ... 887
DURATION:
of partnership, may be implied in certain cases ... n. 157
illustration ... n. 157 *et seq.*
DUTIES:
of partners, what are ... 274–320
personal ... 293

E.

EJECTMENT:
brought to recover land belonging to firm, should be brought in name of whom ... n. 1029
EQUITABLE:
estates, distinction between, and legal ... n. 216
EQUITY:
will not compel admission of stranger to firm though contract provides therefor ... 18
illustration ... 18
exceptions to this rule ... n. 19
will decree specific performance of contract for partnership between parties, when ... n. 19
illustration, Stocker v. Brocklebank ... n. 19
will not decree, unless has full power to compel ... n. 19
will not aid partners in illegal business ... n. 107–n. 110, 116 *et seq.*
will decree dissolution of firm for what causes ... n. 151 *et seq.*
when will enjoin dissolution ... 277
will entertain bill to dissolve partnership at will when account or receiver is prayed for ... n. 155
will restrain immediate dissolution of partnership at will, in special cases ... n. 155
will interfere between partners when ... 271
treats provisions of contract as waived, when ... 295
will enjoin dissolution, when ... 277
remedy of partners between themselves can generally only be had in ... n. 324, n. 335
rejects clauses in contract, when ... 347

EQUITY — *Continued.* Page.
will interfere between partners when 350
will rescind contract of partnership for fraud..... 373, 376
for illegality..... 369
rule in Rawlins v. Wickham..... 377
will aid in recovery of money invested under fraudulent representations of copartner..... 378
rule in McBride v. Lindsay 380
jurisdiction to rescind agreements generally..... 380
will decree specific performance when..... 389, 384–390
will rescind agreement for illegality..... 369
what must be alleged when bill is brought by one partner on behalf of himself and others... 370
when suits may be brought on behalf of others, without their consent. 371
will not restrain acts of majority unless illegal..... 352 *et seq.*
rejects clauses of control not acted on..... 347
will interfere to contract factious minority..... 353
will aid in recovery of money invested under fraudulent representation of a partner..... 378
may decree dissolution, *ab initio*, in certain cases..... n. 420
will decree dissolution when partners refuse to carry on business as agreed..... n. 421
exclusive jurisdiction over accounting between partners..... 430–544
when account will be decreed..... 442
usually consequent on dissolution..... 430
will be decreed when dissolution not prayed for..... 431–442
executors of deceased partners, entitled to, when..... 443
sub-partners not entitled to, from firm..... 443
rights of creditors and legatees of deceased partner..... 445
limited accounting, decreed when..... 444–450
who may have an accounting..... 450
what bill for, must state..... 451
what defendant partners must do..... 451
relative to production of books 453
who entitled to inspection of. 454
of defenses to bills for accounting 455–464
just allowances, what are regarded as..... 465
of the payment of money into court..... 497–499
of sale under decree..... 501
when firm is dissolved by bankruptcy or death..... 501–505
rule upon dissolution at will..... 505
practice when accounting is decreed..... 505
how accounts must be taken..... 506–509, 510, n. 3 p. 506–n. 518
when provision for, is not made in contract..... 508
matters to be considered in taking..... 516–521
how value of joint property is to be ascertained 521
good-will, value of, how ascertained..... 521
what is treated as firm property..... n. 522 *et seq.*
interest, when allowed 482–542
will restrain partners when..... 546–578
special instances 553–560, 567–576

EQUITY — *Continued.* Page.
will restrain majority engaging firm in business not contemplated, 567, 568
will compel partner to conform to his duties as such 568
will appoint receiver when 580–609
See RECEIVER.
pleadings in actions in, between partners 610–622
when bill will lie between 610
necessary parties to 611, 614
bankruptcy of defendant, effect of 612
death of defendant, effect of 612
assignee in bankruptcy may bring bill for account when 612
bill for account lies when 614
parties to contract, only necessary parties to 614
prayer of the bill 616
demurrer for want of parties 616
pleas 616
of account stated 617
court will not generally interfere after settlement 617
statute of limitations 618
releases 620
awards 620
bankruptcy 620
demurrer, when valid 620
requisites of answer 620
practice when partnership is denied 621
creditor of firm may pursue firm property in, when ..... n. 802
contract of partners joint and several in 924, 986
suits in, by and against partners 1152–1159
when may be brought ..... n. 1152
who should be parties plaintiff 1152
when suit may be maintained against partners 1154
who should be made defendants 1155
when separate creditors may bring suit for administration 1157
who must answer 1158

ESTATE:
of deceased partner ....
See DECEASED PARTNER.

ESTATES:
distinction between legal and equitable ..... n. 216

ESTOPPEL:
applicability of doctrine of, to establish quasi partnership ..... n. 6
doctrine of, as applied to persons held out as partners 38
restrictions as to ..... 38, n. 75
may be rebutted, how ..... n. 76
only applies as to persons who dealt without notice or knowledge of facts ..... n. 64
persons estopped from denying partnership, when 1121
when not 1121

EVIDENCE: Page.
to establish partnership, what is ..... n. 11
establishing quasi partnership, *prima facie* establishes partnership *inter se* ..... n. 11
agreement to give one share of profits, acted upon by parties, effect of. n. 11
of sharing in profits as such ..... n. 11
that parties held themselves out as partners ..... n. 11
sign over door of place of business ..... n. 11
cards, circulars, etc ..... n. 11
advertisements ..... n. 11
letter heads ..... n. 11
running carts with names of persons as partners painted thereon ... n. 11
bills to customers ..... n. 12
invoices ..... n. 12
writings generally, as bills, notes, receipts, deeds, etc ..... n. 12
what must be shown in connection with these matters to establish liability ..... n. 12
receiving share of profits admissible as tending to establish partnership ..... n. 12
of third persons to establish partnership, when admissible ..... n. 76
admissions of one partner ..... n. 77
parol, sufficient to establish title of firm to real estate ..... n. 220
what must be shown to recover damages for breach of partnership contract 278
of partnership, what is ..... n. 804
general reputation, not admissible for any purpose ..... n. 804
acts and declaration of partners admissible to prove ..... n. 804
parol, not admissible to show partnership was not to commence at date of contract ..... n. 806
to establish partnership ..... 1036, 1037, n. 1038
to establish dissolution 1042
in actions of tort 1043
declarations of one partner 1040
admissions of partners ..... n. 1041
what must be proved ..... n. 1110
means of proof ..... n. 1111
witnesses, what may be asked ..... n. 1114
how liability of persons as partners may be established 1109–1134
evidence must be sufficient to hold all 1109
kinds of evidence by which established ..... n. 1110 *et seq.*
agreements in writing ..... n. 1113
admissions ..... n. 1113
answer in chancery ..... n. 1114, 1116
advertisements ..... n. 1113
prospectuses ..... n. 1113
bills to customers ..... n. 1114
circulars ..... n. 1114
invoices ..... n. 1114
bills of exchange ..... n. 1114
letters ..... n. 1114
memoranda ..... n. 1114

EVIDENCE — *Continued.* Page.
meetings ... n. 1114
registers and entries in custom house ... n. 1114
release ... n. 1114
shares ... n. 1114
verdict ... n. 1114
joint use of property ... n. 1114
strict proof required ... 1110
may be by parol ... 1114
that bills were drawn and accepted in a particular way ... 1115
declarations or admissions evidence against partner making ... 1117
acts and conduct of the parties ... 1116
records in former suits ... 1116
statements made by others in presence of defendant ... 1118
admissions of one partner ... 1119
admissions after dissolution ... 1119
admissions by agent after dissolution ... 1120
what must be shown to hold firm ... 1120
admission does not make person a partner, may be rebutted ... 1121
when person is estopped from denying partnership ... 1121
may show admissions had no reference to partnership ... 1122
rule in Ridgmay v. Phillips ... 1122
when one partner may be called to prove ... 1123
interest of witness ... 1125
evidence in actions for tort ... 1131

EXCLUSION:
of copartner breach of contract ... 267

EXPULSION:
of partner, clause of, in contract ... 302

EX DELICTO:
taking judgment against one in action, effect of ... 922
who should be parties in actions ... n. 1014, 1027, n. 1028

EXECUTION.
levy of, on interest of partner in firm, ground for dissolution ... n. 162
against joint-stock companies and their members ...
how must be levied on interest of individual partner ... n. 187, *et seq.*, n. 197
cannot sell under, except subject to equities of firm creditors ... n. 187 *et seq.*, n. 199
duty of sheriff ... n. 192
of firm creditors, has preference ... 194
under levy of, sheriff holds joint possession ... n. 196
how issued on judgment after one of the judgment debtors has deceased ... 1140
upon, against firm, firm property as well as separate property of each partner, may be taken ... 1140
joint, must be upon joint judgment ... 1140
what may be taken on ... 1140
plaintiff may have several ... 1141
mode of levying ... 1141
in favor of separate creditors ... 1141, n. 1142

EXECUTION — *Continued.* Page.
as to interest passed by seizure and sale ... 1145
relief of solvent partner against effect of ... 1145
against one partner, what may be taken on ... 1141
what interest passes under ... 1145
creditor of one partner, what may be taken on execution in favor of ... 1141, n. 1142
can only take the partner's interest in the firm goods ... n. 1142 *et seq.*
firm creditors have preference ... n. 1143
debtor, position of ... n. 199
rule when joint creditor has lien on separate property of one partner n. 204

EXECUTOR:
of deceased partner, does not succeed to partner's rights in firm .. n. 17, 18
exception when contract provides for continuance of business by .... n. 17
equity will not decree performance of such contract ... 18
of deceased partner, becomes personally liable for debts created by surviving partner, when ... n. 73
treated as partners, when ... n. 301
carrying on business of deceased partner ... 301
must conform to terms of will ... 300
suits against, for fraudulent acts of deceased partner ... 366
powers of, in certain cases ... 382
entitled to accounting ... 443
rights and powers of ... 535–538
will be restrained from carrying on business in name of old firm ... 572
will be restrained from interfering with firm business ... 558, 573
of deceased partner carrying on business, liable for excess of authority. 948
relative rights of ... 949, n. 950 *et seq.*
what acts of, impose liability on estate ... 962
if sued, must plead survivorship in bar ... 1068

EXPENSES:
distinction between sharing, and losses ... 51

EXPRESSIO UNIUS EST EXCLUSIO NON:
application of, in construction of partnership articles ... 294

EXTRAVAGANCE:
habitual, cause for dissolution ... n. 149, n. 151

F.

FACTORS AND BROKERS:
receiving commission, not partners ... 49, n. 51
selling for share of profits ... n. 51
sharing losses as well as profits, on partners with principal ... 60
illustration—Smith v. Weston—receiving share of profits for sale of goods, not partners ... n. 68

FACTORY:
running for percentage of net proceeds does not create partnership ... n. 13, n. 51

FALSE REPRESENTATIONS:
made by one partner, liability of firm for ... 784, also n. 1
cases illustrating ... 784 *et seq.*

Page.

FARM:
working on shares does not create partnership..... 9, 55, n. 66, n. 85

FARMERS:
firm of non-commercial..... 648
cannot bind each other by notes in name of firm..... n. 648, n. 686, 658
one, of a firm of, cannot pledge credit of, for loan..... 648

FAMILY ARRANGEMENT:
one furnishing house and another provisions does not create partnership..... n. 10

FATHER:
investing money in firm for son, not partner..... n. 73

FELONY:
committed by partner good ground for dissolution..... n. 149

FEME SOLE:
marriage of, *ipso facto* dissolves firm..... n. 151

FERRY:
running for share of profits..... n. 52, n. 66

FIRM:
person liable as partner, though name does not appear in..... n. 75
name may be fanciful..... n. 75
words & Co. annexed to name indicate a firm, but burden is on person seeking to charge persons as members of, to establish relation n. 75
style of..... 287, also n. 3
cannot hold an office..... n. 288
may take under will by firm name..... n. 288
cannot sue or be sued by firm name..... n. 289
cannot sue one of the partners..... n. 289
one partner cannot sue firm..... n. 289
bill drawn by one partner and accepted, cannot be sued by him. n. 289, n. 290
agreements between members of, not binding on strangers..... n. 289
apprentice to, discharged by change in..... n. 291
sureties for, how affected by change in..... n. 291
not liable for acts of members before the firm existed..... 309–316
one partner, member of two, cannot bind both firms..... 656
person knowing his connection, bound to make inquiry..... 656
all members of, agents for it..... 657
liability of, for acts of individual members..... 626–717
giving facilities for commission of fraud by one member must abide the consequences..... 745 *et seq.*
cases illustrating..... 746 *et seq.*
liable for connivance at fraud..... n. 734, 749
cannot obtain title through fraud..... 749
liability of, commences when..... 804
non-commercial, what are..... 647, 648

FORMATION OF CONTRACT. See CONTRACT.

FORMER RECOVERY:
plea of..... 1036, 1096, n. 1100
See ACTIONS.

FRAUD: Page.
partnership established by, persons induced to join may recover back amount paid in ... n. 106
persons induced to join illegal partnership may recover when ... n. 107
on part of partner, ground for dissolution ... n. 149
by one partner, defense to action in name of firm though innocent of participation in it ... n. 290
person taking partnership property in payment of private debt guilty of, when ... n. 626, n. 627
only slight evidence of, required to set aside sale by one partner ... n. 641
firm liable for, of one partner, when ... n. 716, 719 *et seq.*
when liability attaches ... 723
not liable for willful acts of copartner ... 723
as regards torts ... 724
as regards frauds ... 725
liability of partners for misapplication of money by the members of the firm ... 725 *et seq.*
rule when firm receives money belonging to third persons ... 726
rule in Bromley v. Blair ... 727
rule in Ribeyre v. Barclay ... 727
not liable for frauds in matters not connected with firm business ... 729
not liable for frauds of partner in his own business ... 730
not liable for wrongful use of trust funds in hands of one partner ... 732
liability for false representations of one partner ... 734
copartners not liable when act is in excess of real or apparent power ... 735
liability of companies for frauds of directors ... 736–740
effect of circulars, reports, etc., issued by company ... 740
when may be used against the company ... 741
liability of directors for frauds by issuing false circulars, etc ... 742
negotiable securities fraudulently issued, valid in hands of *bona fide* holder ... 742
rule in Lacy v. Walcott ... 743
rule in Sanderson v. Brocksbank ... 743
liable for fraudulent acceptances ... 744
rule in Rapp v. Latham relating to fraudulent contracts of one partner ... 744
firm giving facilities for commission of frauds must abide the consequences ... 745–749
firm cannot obtain title through fraud of one partner ... 749
firm liable for connivance at fraud in certain cases ... 749
acts must have been done as a partner ... 750
of liability for torts of partner ... 752
when action may be against all ... 752
when may be against one or all ... 753
rule in King v. Manning ... 754
when only one is liable ... 754
creditor of one partner taking partnership property in payment *prima facie* fraud on firm ... n. 795

FRENCH LAW:
partnership divided into three classes by ... n. 4
the different classes defined ... n. 4

G.

Page.

GOODS:
furnished to be sold on shares..... n. 10
selling for what can be got beyond certain sum..... 50
illustrating, see Benjamin v. Portens..... 50
for share of profits..... 51
purchasing for share of profits..... 54
purchased by one partner in firm name, liability of firm though applied to individual use, of partner purchasing..... 679

GOOD FAITH:
gross violation of, good ground for dissolution..... n. 149

GOOD-WILL:
of firm, what is, interest of partners in..... 236 *et seq.*, n. 238
sale of, by one partner, does not prevent vendor from setting up same business..... 571
but cannot set up under old name..... 571
may style himself as formerly member of old firm..... 571
agreement not to set up same business may be implied..... 571
of firm, will be protected by injunction, when..... 572

GOVERNMENT:
officer or agent of, sharing in profits of contract with, illegal when.. n. 105

GOW:
definition of partnership by..... 3

GROSS EARNINGS:
agreement to divide does not create partnership..... n. 8, n. 13, n. 35, ... n. 37, n. 57, n. 68
running farm on shares..... n. 9
running saw-mill on shares..... n. 9

GROSS RETURNS:
selling business, and receiving share of..... n. 68

GROTIUS:
definition of partnership by..... 2

GUARANTY:
by one partner, binding on firm when ..... n. 648
power of partner to bind firm by 666, 667
one partner cannot give, except pertaining to partnership business.... 705
adoption of, made by one partner, by the firm..... 705
what amounts to..... 705
to one partner, not guaranty to firm..... 992
exception..... 994
made to one partner for benefit of firm, may be sued on by firm 1032
what declaration should state 1033

GENERAL PARTNERSHIP:
what is..... n. 3

H.

HEIRS:
when they succeed to business..... 301

HOLDING OUT: Page.
as partner creates liability, when no partnership in fact exists..... n. 6
as partner, must be known to creditor before debt was created, to establish liability ..... 38–40, n. 3, 39
person not liable, unless he knew of..... 40, 43
as about to become partner, effect of..... 43
that creates partnership quoad..... 88–90

I.

INFANCY:
plea of..... 1106
See ACTIONS.

INFANTS.
may be partners..... n. 17 22
bound, when..... n. 17
illustration of rule applicable to..... n. 22

INFANT PARTNER:
treated as incoming partner when..... 837
Goode v. Harrison 838
may affirm contract after becomes of age 838
representing himself as partner shortly before becoming of age..... 838
liability as to past contracts..... 839
when may maintain action for money paid on contract..... 839
when may be made a bankrupt 839
cannot claim profits, without being debited with losses..... 839
in joint-stock company, not bound to pay calls, but must do so or give up his shares in..... 840
when may recover back money invested in firm..... 840
on attaining majority, must disaffirm contract within reasonable time, or will be bound..... 840
effect of permitting his name to be used in firm after he becomes of age 840
if, dues not expressly affirmed or disaffirm, held liable..... 840

ILLEGAL:
acts of partners will be restrained..... 352

ILLEGAL CONTRACTS:
by partners, cannot be enforced..... 115 *et seq.*

ILLEGAL PARTNERSHIPS:
assuming name for, not illegal..... n. 106
any number of persons may lawfully be partners..... n. 106
not illegal to receive new member..... 106
or to contract to permit retiring member to introduce new one in his stead..... n. 106
or to permit one or more to conduct the business..... n. 106
business prohibited by statute..... n. 105
opposed to public policy..... n. 104–n. 110
imposition of penalty, does not necessarily render business illegal.. n. 105
agreement between officer or agent of government to share in profits of contract with government, void..... n. 105
consequences of illegality of..... n. 107 *et seq.*

ILLEGAL PARTNERSHIPS—*Continued.* Page.
as to right to recover back subscriptions..... n. 107
as to right to account..... n. 107
sales of shares..... n. 107
equity will not relieve, when..... n. 107–n. 110
bond, for payment of money to, void..... n. 107
members of firm cannot recover for goods illegally sold..... 108
may be sued, though it cannot sue..... n. 108
who may sue..... n. 108
parties in *pari delicto* cannot..... n. 108
members of, not entitled to contribution..... n. 108
illegality as a defense to actions at law..... n. 108 *et seq.*
may be waived..... n. 109
illegality a defense in equity..... n. 109
illegality, when not a defense..... n. 109
illegality set up by executors..... n. 110
illegality by trustees generally..... n. 110
cannot be in illegal business..... n. 104–n. 110
what is, and what is not illegal so as to defeat partnership... n. 104–n. 110
persons by law restricted from entering into partnership..... 124 *et seq.*
usurious contracts or..... 119 *et seq.*
cases illustrating..... 120 *et seq.*
in business requiring license..... 130

ILLEGALITY:
as defense to action for receiver..... 596

IMMORALITY:
cannot be partnership in business promoting..... n. 104–n. 110

IMMORAL CONDUCT:
on part of partner, ground for dissolution..... n. 149

INCAPACITY:
of partner for business, cause for dissolution..... n. 151

INCOMING PARTNER:
rules applicable to..... 307 *et seq.*
may assume debts of old firm..... n. 824
not liable for, unless is novation, and promise..... n. 824, 835
what amounts to a novation..... 836
payment of interest by new firm, on old debt..... 824
Kirwan v. Kirwan..... 824
commencement of liability in ordinary partnerships..... 825
cases illustrating..... 826 *et seq.*
principle applies to incoming partners..... 828
Young v. Hunter..... 828
Ex parte Jackson..... 829
liability arising from tacit contract..... 829
Dyke v. Brewer..... 829
may make himself liable by agreement..... 830
how established..... 830
instances in which liability was created..... 831
Ex parte Whitmore..... 831

INCOMING PARTNER — *Continued.* Page.
note or bill of new firm for old debt *prima facie* a fraud on incoming partner. ... 831
introduction of new partners into firm. ... 831
liabilities of. ... 823–841
Sheriff v. Wilks. ... 823
must not be joined as plaintiff or defendant in suits relating to old firm 833
evidence of assuming obligation to pay debts of old firm. ... 834
Hilsby v. Mears. ... 835
when not liable. ... 837
Young v. Hunter. ... 837
infant coming of age treated as. ... 837 *et seq.*
Goode v. Harrison. ... 838 *et seq.*

INCORPORATED COMPANIES:
not partnerships. ... n. 5
how established. ... n. 5
distinction between, and firms. ... n. 5
partnerships unless duly organized. ... n. 21, 1

INDICTMENTS:
against partners. ... 1043

INDORSEES:
of notes or bills, acting in bad faith, will be restrained when. ... 557

INDORSEMENT:
of note or bill or other security, by one partner, after dissolution, invalid. ... n. 170, n. 172, n. 176

INJUNCTION:
to restrain dissolution, granted when. ... 277
will only be issued to restrain acts of majority, when. ... 352
to restrain factious minority. ... 353
will not interfere when complainant has been guilty of laches. ... 354
effect of laches. ... 354
when party estopped from setting up laches. ... 355
applicability of doctrine to companies. ... 356
instances in which laches will not be regarded. ... 359
recognition of claim overcomes laches. ... 362
AS BETWEEN PARTNERS:
of the right to. ... 546
to enjoin negotiations of bills, when. ... 547, 567
when partnership has been dissolved. ... 548
upon application of executor of deceased partner. ... 549
when injunction will be granted without dissolution. ... 549, 553
of the rule not to interfere in matters of internal regulation. ... 550–553
injunction and dissolution — instances in which injunction will be granted. ... 553–560
partner seeking to restrain must show willingness himself to conform to the provisions of the contract. ... 560, 574
equity will restrain one from holding out another as his partner against his will. ... 561
injunction without dissolution. ... 561

INJUNCTION, AS BETWEEN PARTNERS — *Continued.* Page.
real or threatened breach of contract must be alleged 562–567
instances in which equity will restrain 567–576–n. 575
rule in Goodman v. Whitcomb 576
injunction when there are no grounds of dissolution 577
rule in Williams v. Williams 577
mode of obtaining injunction 578
to prevent improper use of firm property 553, 567
to restrain acts in violation of express or implied provisions of the contract 554
to restrain partner from setting up inconsistent business 554, 558, 574
to restrain partner from applying partnership property to his individual use 554, 573
from negotiating or accepting notes or bills for other than firm purposes 556
from preventing the partners from examining the partnership books .. 556
from doing acts inconsistent with his relation as partner 555
from excluding a partner 555, 570
from impending business of the firm 556, 567
executor of deceased partner will be restrained from making improper use of firm property 556
or from carrying on business in name of old firm 558
surviving partner will be enjoined when 556
when suit to dissolve is pending, partner will be enjoined when 557
indorsees and payee of notes or bills will be restrained when 557
when partner will be restrained from getting in firm debts 557, 572
from withholding firm books 557, 567
to restrain assignee or vendee of one partner from interfering with business 558
from divulging trade secrets 559
retired partner will be restrained from carrying on business as successor of firm 559, 571
action at law between partners will be restrained when 560
misconduct of partner, that furnishes ground for injunction ... 560, 567–576
violation of duty will be restrained 567
partner selling his good-will in business will not be restrained from setting up in same business 571
agreement not to set up in same business may be implied 571
when is express agreement not to, will be restrained 572
firm will be restrained from holding person out as member of, against his will 573
insolvent partner will be restrained from selling firm property, or getting in firm debts 574

INSANITY:
of partner, when court will decree dissolution for ..... n. 152 *et seq.*; n. 421 *et seq.*, 426
effect of inquisition of lunacy ..... n. 152, 427
will not be decreed for, unless is hopeless .. n. 152 *et seq.*; n. 421 *et seq.*; 426
decree limited to time when granted ..... n. 152
if merely temporary, will not dissolve for ..... n. 153
cases illustrating rules applicable to ..... n. 152–n. 155

INSOLVENT:
Page.
partner will be restrained from selling firm property or collecting firm debts..... 574

INSOLVENCY:
of firm ground of dissolution..... n. 162

INTENTION OF PARTIES:
effect of, in establishing partnership in fact..... n. 7
persons may be partners as to third persons although they did not intend to be..... n. 71
persons may become partners, against, when..... n. 76

INTER SE PARTNERS. See PARTNERS INTER SE.

INTEREST:
community of, does not create partnership..... n. 7, n. 8

INTOXICATION:
habitual, good ground for dissolution..... n. 149 *et seq.*

INVOICES:
admissible to establish partnership..... n. 12
as evidence to establish partnership..... n. 1114

J.

JOINT ESTATE:
of partner's in stock..... n. 179 *et seq.*
conversion of, into separate..... n. 184
See BANKRUPTCY.

JOINT INTEREST:
must be established by parties suing jointly..... 15

JOINT OWNERS:
not partners..... n. 9, n. 37
of patent, not partners..... n. 37

JOINT PURCHASE:
of property, proof of, does not establish partnership..... 18
illustration, Gregory v. Martin..... 18, 48

JOINT PURCHASERS:
not necessarily partners..... n. 9, 36–43, 48
must be jointly concerned in future sale..... 35
or in otherwise dividing profit from..... n. 9

JOINT-STOCK COMPANIES:
not incorporated, not illegal..... n. 106
test of power of directors of, to execute notes, etc..... 658–677
majority controls..... 662
instruments under seal of, effect of..... 666
bound by indemnities given by directors, when..... 667
not bound by statements of members..... 675
not bound by statements of one director, when..... 675
bound by admission of a member, when..... 676
liable for fraud of directors when..... 736–740

JOINT-STOCK COMPANIES — *Continued.* Page.
person does not become partner in, unless..... n. 809 *et seq.*
illustrations.....n. 809 *et seq.*
of joint-stock companies in general..... 1198
of the Bubble Act..... 1200
later acts 1203
repeal of the statute and its consequences..... 1206
who are to be treated as usurping powers of a corporation..... 1208–n. 1214
test of legality as to joint-stock companies..... 1210
what makes one a partner in..... 1211
what constitutes an actual partner in..... 1211
articles of association..... n. 1213
by holding out..... 1221
liability of promoters or provisional directors..... 1223
liability of the company..... 1233
liability of shareholders..... n. 1214
legal remedies affecting companies, members of, and strangers..... 1235
of the formation of, evidence to charge one as shareholder..... 1249
where there has been no waiver of formalities..... 1255
as between company and alleged shareholder..... 1256
as between alleged shareholder and a creditor..... 1257
cost-book mining companies..... 1263
of chartered companies..... 1266
of companies under letters patent..... 1267
of the mutual rights of shareholders..... 1269
when company is projected, but never formed..... 1269
every party suing must be named..... 1272
deed of settlement, what it should set forth..... 1277
the general law of partnership applies when the deed of settlement does not provide remedies..... 1280
when shareholders may proceed in equity against the directors..... 1283
of the relative rights of shareholders..... 1287
liability of shareholder of unincorporated company..... 1288
powers of agent or manager of company..... 1290
unincorporated companies, liability of..... 1291
of the management of companies..... 1292
of companies under 7 & 8 Vict., managing bodies..... 1298
as to shareholders..... 1302
as to managing body..... 1304
as to shareholders of statutory companies..... 1307
of the sale and transfer of shares..... 1309
of the relinquishment of shares, and of the right to retire..... 1323
of the forfeiture of shares and the right to expel..... 1323
of suits in equity between company and strangers..... 1330
grounds on which equity will interfere..... 1330
when will enjoin..... 1338
ex parte injunctions..... 1340
will restrain company from acting in excess of authority..... 1340
when injunction will be refused..... 1343
suits in equity among the shareholders of joint-stock companies..... 1344
dissolution when all partners cannot be present..... 1346
account without dissolution..... 1348

JOINT-STOCK COMPANIES — *Continued.* Page.
general discussion of question ... 1358
demurrer ... 1364
plea ... 1364
answer ... 1368
injunction against directors, etc ... 1369
an injunction has been refused to restrain ... 1370
actions at law against companies ... 1371
of the recovery back of subscriptions to companies ... 1377
of actions between companies and their shareholders ... 1384
of actions for calls ... 1384
of actions for dividends ... 1387
of set-off, by and against companies ... 1388
of executions against companies and their shareholders ... 1390
as to executions against company or person named in judgment ... 1391
as to proceedings against shareholders upon judgment against company 1393
as to shares ... 1393
termination of liability ... 1395
when shares in companies are specifically bequeathed ... 1398
profits, division of ... 1400

JOINT AND SEVERAL:
contracts of partners are, in equity ... 924, 936

JOINT TENANTS:
partners are, in stock ... n. 179

JOINT VENTURE:
what constitutes ... 58
renting premises for share or profits, is when ... 58

JUDGMENT.
taken by one of two joint creditors, effect of ... 1002

JUST ALLOWANCES:
to partners, what are ... 465, 540

L.

LACHES:
of partners, effect of ... 354–363

LAND:
partnership for purchase and sale of, may exist and be proved, by parol, 8
owned in common and worked for profit of all ... 57
See REAL ESTATE.

LAWYERS.
one of a firm of, cannot pledge credit of firm for a loan ... 648
one, cannot bind firm by note or bill except ... 658, n. 687, n. 793
firm of, non-commercial ... 648
liable for acts of either, in scope of business ... n. 642

LEASE:
taking by one partner in his name, fraud on his copartner ... 502
one partner cannot bind firm by contract for ... 670
notice to quit given by one, effect of ... 670
to firm, retiring partner liable under, unless ... 854

LEASE—*Continued.* Page.
made by one partner, action for rent or breach may be brought by him alone. ..... n. 1029

LEGAL:
estates, distinction between, and equitable..... n. 216

LEGATEES:
of deceased partners, rights of, as to accounting..... 445

LETTERS:
as evidence to establish partnership..... n. 1114

LETTER HEADS:
evidence of partnership..... n. 11

LIBEL:
when firm may sue for..... n. 1029
when one partner must sue for..... n. 1149

LIEN:
of partners on stock and funds for payment of firm debts..... 167
partnership creditors have none except through partners themselves..... n. 187 *et seq.*
of partner on stock..... 186
nature and extent of..... 186
rule where joint creditor has lien on separate property of one creditor. n. 204
of partners, extent of..... n. 189 *et seq.*
of firm creditors, nature of..... n. 187 *et seq.*; n. 249
how worked out..... n. 249

LIMITATIONS:
admissions, promise of, or part payment by, one partner after dissolution, effect of..... n. 171, n. 178 *et seq.*
contrary rule in some States..... n. 176
statute of, as defense to bill for accounting..... 456–460, 618
upon authority of one partner operative, when..... 632
Hawken v. Bourne..... 638 *et seq.*, n. 641

LIQUIDATING PARTNER:
cannot bind firm by note or bills after dissolution..... 171, n. 177
or renew one given before..... 171, n. 177
contrary rule in some States..... n. 177

LOAN.
or advances to be returned, with share of profits, effect of..... 55
instances..... 55-57
to one, under agreement to share losses does not create partnership.. n. 8
when partnership is created by..... n. 85
to enable person to manufacture patented articles does not constitute partnership when..... 70, n. 84
illustrating, Eligie v. Webster..... n. 70
when it does..... 28, n. 85
illustrating, Manhattan Brass Co. v. Sears..... n. 28
to one partner, for share of his profits creates partnership when. n. 70, 95–102
illustrating, Legget v. Hyde..... n. 70
when it does not..... 95–n. 102

LOAN — *Continued.* Page.
illustrating, Bullin v. Sharp, etc. n. 98
of money for share of profits creates partnership when 59
to be used in trade, profits to be shared does not create partnership *inter se* 92
reserving interest, and specific sum in lieu of profits 134 *et seq.*
effected by one partner for benefit of firm 677
receiving annuity or interest for, does not create partnership 95
cases illustrating 96–103
rule as to receiving share of profits for, in New York n. 95
in Connecticut n. 102
contrary rule in England 95–n. 102
tendency of modern cases 95–n. 102
rules adopted 95, n. 103
in Pennsylvania n. 100
in Illinois n. 101
in New Hampshire n. 95
in Ohio n. 100
rule in Bullen v. Sharp n. 98
in Davis, Ex parte n. 95
in Dean v. Harris n. 100
in Harvey v. Childs n. 100
in Smith v. Knight n. 101
in Hart v. Kelley n. 100
Leggett v. Hyde n. 70
Parker v. Canfield n. 102
American States in which English rule has been adopted n. 100
rule when return of, is dependent upon accidents of trade 103
presumptions respecting, made by one partner n. 678
rule when lender knew or ought to have known the facts n. 678

LOSS:
agreement to share in, does not create partnership n. 8
agreement not to share in, effect of n. 34
community of 47

LOSSES:
distinction between, and expenses 51

M.

MAJORITY:
of firm, powers of 270, n. 282, 295
rule in Court v. Harris 270
cannot change the nature of the business n. 282
illegal acts of, will be restrained 353
of shareholders in joint-stock company, control 661

MANUFACTURER:
receiving stock to be manufactured for percentage of profits n. 81

MANUFACTURING:
goods for share of profits n. 69
illustrating, Loomis v. Marshall n. 69

Page.

MARRIED WOMEN:
may be partners, when 24
rules applicable in such cases 24–n. 25

MATERIALS:
furnished for another to manufacture does not create partnership 57
may do so, when such is evident intention 57

MECHANICS:
working on shares, not partners ..... n. 1, 37
cases illustrating ..... n. 1, 37
partners, one cannot bind firm by note or bill except ..... n. 794

MEMORANDA:
as evidence of partnership ..... n. 1114

MERGER:
doctrine of, as applied to partnership debts 921
giving firm note for individual debt 921
must be agreement to take in payment 922
taking higher security, merges former debt 922
illustration 922
recovery of judgment against one in action *ex delicto* 922
giving separate security by one joint debtor, effect of 922
bond or judgment, operates as merger when 923
in equity 923
proof in bankruptcy against estate of one partner 924

MILL:
running upon shares, does not create partnership ..... n. 13

MILLERS:
firm of, owning mill, not liable for lightning rod put up under contract with one ..... n. 686

MINES:
partnership in 1160–1168
See PARTNERSHIP; MINING FIRMS.

MINING FIRMS:
one member of, cannot bind his copartner by note unless ..... 687, n. 658
appointment of receiver in 596
not bound by note made in name of, by agent ..... n. 648

MINORITY:
factious, will be restrained when 353

MISCONDUCT:
of partner, degree of, for which court will decree dissolution ... n. 149 *et seq*
must be such as to destroy mutual confidence ..... n. 151 *et seq*
for which receiver will be appointed 595

MISJOINDER:
of partners may be proved under general issue 1042

MISNOMER:
plea of abatement on account of 1087
See ACTIONS.

MISTAKES: Page.
in accounts, will not generally be reopened for 617
in name of firm in bill, remedied by acceptance in right name.....n. 701

MONEY:
loaned for share of profits, does not create a partnership between borrower and lender..... n. 8, n. 31
loaned to one partner on his separate account, firm not liable for, although used in its business, unless 798
loaned to one partner on credit of firm, firm may be liable for, although the partner borrowing, with the knowledge of the lender, was credited therefor on books of firm..... 798
Ex parte Bonbonus 798
lent by one partner to another may be recovered for at law ..... n. 332

MORTGAGE:
executed by one partner not binding on firm..... 670

N.

NAME:
of firm, may be of one partner, or fictitious..... n. 287
whatever is done under such name, binding on all..... n. 288
may be a trade-mark..... n. 288
may be a name appropriate to a corporation..... n. 287

NEGLIGENCE:
of partner, ground for dissolution..... n. 149 *et seq.*

NEGOTIABLE SECURITIES:
fraudulently issued, liability of firm on..... 742
cases illustrating..... 743 *et seq.*
See BILLS OF EXCHANGE; NOTES.

NEW PARTNER:
introduction of, into firm dissolves it ..... n. 151

NEWSPAPER:
arrangement for publication of, that does not create partnership..... 88

NOMINAL PARTNERS. See PARTNERS.

NON-JOINDER:
may be shown under general issue when..... 1060
of parties, must be plead in abatement..... 1057
plea of abatement on account of. 1068
See ACTIONS.

NONSUIT:
when will be directed 1135

NON-COMMERCIAL:
firms, what are.....647, 648

NON-TRADING:
firms, instances in which held liable for notes given in firm name by one..... n. 642, n. 647
firms, bound by acts of partner within usual scope of business only.... 642
not bound by notes executed by one partner, except..... ... 648

NON-TRADING — *Continued.* Page.
firm liable for acts of one partner, when they have permitted him to do similar acts before ..... n. 650
liable for acts of one partner when ..... n. 657, 658
test of authority of one to bind firm be negotiable securities 658
one partner may bind firm by purchases when 673
test as to whether one partner may bind firm by note .....658, n. 686, n. 687

NOTES:
due firm cannot be negotiated by one partner after dissolution ..... n. 170
even though authorized to settle up business ..... n. 171
one partner may take, payable to firm ..... n. 171
indorsement of, after dissolution invalid ..... n. 170
delivery of one executed before, after dissolution, not binding ..... n. 172
one partner cannot renew, after dissolution ..... n. 171
cannot bind firm by note made before, but not delivered until after dissolution ..... n. 172
presumption as to power of one to bind firm by ..... n. 678 *et seq.*
when presumption attaches ..... n. 678
made by one partner in firm name 695
made by one partner, firm liable for, when 685
test of authority of one partner to bind firm by ..... n. 686
made in firm name, *prima facie* on firm account ..... n. 688
made by one, not binding when .. n. 686, 687–n. 688, n. 696 *et seq.*, n. 699 *et seq.*
given by one partner not binding in hands of one who knew that he had no authority to execute .....
forms of in which firm has been held liable on ..... n. 699 *et seq.*
instances in which they have been held not liable ..... n. 699 *et seq.*
promise by one partner alone, not binding ..... n. 702
when each partner signs severally ..... n. 702
when one promises in name of firm ..... n. 702
when one attempts to bind himself and firm jointly and severally. n. 702, 707
promise by one for himself and the firm ..... 706, n. 708
not binding when ..... n. 702
instances where form of, is defective as partnership obligation ..... n. 702
cases illustrating ..... n. 702 *et seq.*
fraudulently issued, liability of firm on 742
cases illustrating ..... 743 *et seq.*
received to pay debt of individual partner, validity of ..... 786, n. 787
Heath v. Sansom 786
Arden v. Sharpe 786
such note may be valid in hands of *bona fide* holder ..... 787, also n.
how it may become operative ..... n. 787
circumstances that put a holder upon inquiry ..... 788 *et seq.*
fact that note and signature are in one handwriting 789
Hope v. Cust ..... 787 *et seq.*
Sheriff v. Wilks 790
Ex parte Goulding 791
burden of proving liability of firm on such notes, upon holder. n. 1, 792, n. 794
of trading firms, though fraudulent, binding in hands of *bona fide* holders ..... n. 793
presumptions relating to ..... n. 793

NOTES — *Continued.* Page.
contrary rule as to non-trading firms ..... n. 793 *et seq.*
must be executed in firm name to bind it ..... n. 793
given by one member of a firm limited to particular business, outside such business ..... n. 793
knowledge of payee, of fact that note was unauthorized, may be inferred ..... n. 793
to be binding on firm, must be executed in its name ..... n. 793
given by firm for debt created before partnership began 821
executed after dissolution, binding on firm when ..... n. 844
security only to payee 996
of firm, negotiated after dissolution, not binding on, unless 854, 857
rule in Kilgour v. Finlayson 855
of one partner for debt of firm, discharges firm when ..... n. 1095

NOTICE:
or knowledge of limitations upon authority of partners, binding .... n. 63
so of partnership agreement as to liability ..... n. 63
of dissolution, when required ..... n. 163
how must be given ..... n. 163 *et seq.*
actual, not required ..... n. 163
to one partner, notice to all 715
of limitation upon authority of servant, operative when ..... n. 641
to one binds all 671–673
limitations as to 672–673
as to joint-stock companies 673

O.

OBLIGATIONS:
new, cannot be imposed on firm after dissolution without consent of all the members ..... n. 170
even though partner entering into, is authorized to settle business .. n. 171
of partners to each other ..... 255–272, n. 259
what transactions operate as breach of ..... 257 *et seq.*
rule in Featherstonhaugh v. Fenwick 258
duties as to joint property 263
bound to work for interest of firm 263
rule in Long v. Majestre 263
duty not to assume position to bias him against firm 264
of surviving partner, also executor of deceased partner 265, 271
as to accounts 266
must not exclude a copartner 267
as to expenses 267
stock must be used for any promotion of trade 269
when firm consists of distinct firms 271
implied, between partners ..... n. 281 *et seq.*
contract to be construed in reference to ..... n. 281
rights and obligations of partners under contract 274
ground upon which specific performance is decreed 275
when contract is continuous and profits uncertain 275
action for damages for breach of contract 276

OBLIGATIONS — *Continued.* Page.
rule in Hercy v. Birch ... 276
when equity will enjoin dissolution ... 277
what must be shown to maintain action for damages ... 278
rules for construction of contract — Gainsborough v. Stark ... 279
how far acts of partners affect construction ... 280
nature of business ... 282
time when partnership begins ... 286
term of ... 286
style of firm ... 287
shares to be advanced ... 288
several rights in real property ... 290
profits to be distributed ... 292
personal duties of partners ... 293
keeping proper books ... 293
not exercising same trade on separate account ... 293
express stipulations against ... 293
expressio unius est exclusio non ... 294
when partner retires before term is ended ... 295
decision of differences by the majority ... 295
acquiescence in deviation from terms of contract, effect of ... 296
annual account ... 296
when equity treats provisions of contract as waived ... 296
errors may be stipulated against ... 297
general account upon dissolution ... 297
executors or legatees carrying on trade of deceased partner ... 297
power of appointment need not be strictly executed; rule in Ponton v. Dunn ... 298
construction of clause for substitution ... 299
representative of deceased partner must conform to terms of will ... 300
executors treated as partners in certain cases ... 301
when children succeed to business of deceased partner ... 301
clause of expulsion ... 302
arbitration ... 302
partnership by deed must be dissolved by deed ... 303
liquidated damages ... 304
when real estate is subject of arbitration ... 304
deed of dissolution must be specific as to time when it takes effect .. 304, 305
what such deeds usually contain ... 305
when retiring partner leaves capital in the firm ... 305
taking annuity does not create liability as partner ... 306
effect of taking usurious interest ... 306
incoming partners ... 307
rule when partners are indebted to firm — Simpson v. Rackman ... 316
deed of trust made by one partner ... 317
rule in Belcher v. Sikes as to deed of dissolution as to individual matters. 317
as to ownership of stock ... 318
courts of equity will not relieve, except ... 320

OBSCENE:
publications, cannot be lawful partnership for printing or sale of ... n. 104

OFFICE: Page.
cannot be partnership in ... 112

OFFICER:
or agent of government, sharing in profits of government contract, illegal when ... n. 105

OSTENSIBLE PARTNERS. See PARTNERS.

OUTGOING PARTNERS. See RETIRING PARTNERS

OYSTER DREDGERS:
running boats and gathering oysters for share of profits not partners with owners of the boats ... n. 66
case illustrating, Perrat v. Bryant ... n. 66

P.

PARTNERS:
who are, and who are not ... n. 5
persons who hold themselves out as ... n. 6
persons who share profits and losses are ... n. 6
ostensible, who are ... 11
nominal, who are ... 11
dormant, who are ... 11
who are liable to third persons as ... 16
holding out as, evidence to fix liability when ... n. 12
using name of person as, upon sign at place of business ... n. 11
in suits by, must prove partnership ... n. 15
at least, if denied ... n. 15
defendant may prove, if he can, that plaintiffs are not partners, under the general issue ... n. 15
all must join in suits by ... n. 15
death of partner after suit brought ... n. 15
surviving, may bring suit in his own name ... n. 15
actions by, should be in individual names of ... n. 15
suits may be brought in name of firm in some States ... n. 15
who may be ... n. 17, 21
infant may be ... n. 17, 22, see n.
person sharing in advantages of, rule as to ... 32
liability as, how created ... 37-43
illustrating, Fox v. Clifton, Pott v. Eyton, Newsome v. Cole ... 40-43
mechanics, working on shares, not ... n. 37
cases illustrating ... n. 37
general and particular, who are ... 46
test of powers and liability ... 46
members and managers of clubs ... 44, 46
persons held to be, from sharing in profits, rules applicable to ... 45
persons retaining specific share of goods, not ... 48
illustration, Post v. Kimberley ...
married women may be, when ... 24-25
when by statute ... 24
when at common law ... 24-25
corporations may be ... 25

PARTNERS — *Continued.* Page.
in profits, who are ... 27
inter se, who are ... n. 4, 27
peddlers selling goods for share of profits ... 51
factors and brokers receiving commission ... 49
selling goods for what can be got above certain price ... 50
for share of profits ... 51, also n. 1
running tannery for share of profits ... n. 51
agent, not liable as ... 49, n. 51
running ferry for share of profits ... n. 52
running factory for share of profits ... 51, n. 52
illustrating, Denny v. Cabot, Turner v. Bissel ... 51, n. 52
leasing house for share of profits ... n. 53
one not so in fact, may be charged as when ... 19–21
illustration, Goddard v. Hughes ... 20
person represented in firm by another, is ... 19
no restriction as to number of, in firm ... 21
alien friends may be ... 23
rule when war breaks out ... 23–n. 24, 2
in separate ventures ... n. 30
persons held out as ... 38
sharing in profits and loss ... 38
persons receiving annuity for loan, not ... 96–103
persons loaning money for share of profits ... 95–n. 102
ships-crew not, with owner ... 53
shipmaster not ... 53
must be right in profits as result of a venture ... 54
persons are, who agree to become either expressly or by implication ... 59
lender and borrower of money, are, when ... 59
factors and brokers sharing in losses as well as profits ... 60
stage-owners, agreements between, that bind them as ... 62
persons sharing profits and loss, are *inter se* ... 62
interest in profits that creates relation of ... 59–94
landlord receiving share of profits in lieu of rent ... 58, also n. 6
agreements between, as to limitations upon liability, not binding on third persons, except ... n. 63
effect of notice of limitation upon powers of ... n. 63
effect of knowledge or notice that one held out to be, is not so in fact, n. 64
landlord who takes share of profits of tavern in lieu of rent, not ... n. 66
person dealing with, as to matters beyond scope of apparent authority, n. 63
person advancing money for another to buy property for share of profits ... n. 66
pasturing cattle for share of profits, on sale ... n. 67
persons may be as to third persons, against their intention ... n. 71
need not be jointly interested in capital stock ... n. 72
joint interest in profits and loss creates relation of ... n. 72
part owners of steamboat, not ... n. 73
person participating in profits, for services, not ... n. 73
persons liable as, though name not used in firm ... n. 75
burden of establishing relation, on plaintiffs ... n. 75
sub-partners, who are, when liable as ... n. 76

PARTNERS — *Continued.* Page.
when equity will interfere ... 271
may enter into sub-partnership ... 269
each agent for his copartner ... 269
not entitled to contribution when loss results from negligence or fraud. 269
selling goods to be smuggled, firm cannot recover for ... n. 290
property pledged by one, cannot be recovered by firm ... n. 290
covenant not to sue, made by one partner ... n. 291
one, paying his debts with firm property ... n. 291
persons receiving share of profits, not partners, when ... 90–93
cases illustrating ... 90–93
attorneys, arrangement between, held to create, *inter se* ... n. 92
person selling patent for share of profits, not ... 92
persons legally disqualified, cannot be ... 124 *et seq.*
as to third persons, who are ... 133–147
community of profit between ... 133
cases illustrating ... 134 *et seq.*
sharing in profits, primary test ... 138
presumption arising from, may be repelled ... 140
powers of, after dissolution ... 169
becomes trustee ... 169
has lien upon stock and funds for payment of firm debts ... 169
separate estate in stock ... n. 181
test as to ownership of stock ... n. 179
duties and obligations of, to each other ... n. 255–272, n. 259
what transactions operate as breach of ... 257 *et seq.*, n. 259
rule in Featherstonhaugh & Fenwick ... 258
duty as to joint property ... 263
must work for interest of firm ... n. 255, 263
trading with partnership property, must account for profits ... n. 259
selling goods to firm, concealing his interest in ... n. 259
entering into secret partnership, bound to account for his share of profits in, when ... n. 260 *et seq.*
must not assume position that will bias him against interest of firm ... 263
rule in Long v. Majestre ... 263
rule when survivor is executor of deceased partner ... 265, 271
implied powers of ... 309–316
not liable for acts done before firm was established ... 309
one cannot sue his copartners in trover or trespass for detaining or injury to firm property ... n. 330
test as to when partner may sue firm or copartner ... n. 331, n. 396
Venning v. Lecker, Hesketh v. Blanchard, illustrating ... n. 331–n. 332
cannot dissolve partnership for a term at will ... n. 421
one cannot sue the firm ... n. 322
one firm cannot sue another having a common member ... n. 323
assignee of, cannot sue firm ... n. 323
reason for rule ... n. 323, n. 328
may sue for balance struck ... n. 324–n. 340
when may sue for balance ... n. 324–n. 340
may sue firm upon individual transactions ... n. 325 *et seq.*; n. 326, n. 337
illustration of the exceptions ... n. 325 *et seq.*
upon special promise ... n. 325, n. 326

PARTNERS — *Continued.* Page.
as, upon note given for balance due ..... n. 326, *contra*, n. 396
upon agreement to account at certain periods ..... n. 326
upon agreement to pay certain debts ..... n. 326
for amount of note fraudulently given by one partner and paid by plaintiff ..... n. 326
for breach of duty ..... n. 326
for matters arising before partnership was formed ..... n. 326
cannot sue firm 327
survivor of one firm, partner with another, may sue survivor of such firm ..... n. 327
one cannot maintain replevin against firm ..... n. 327
one partner cannot sue firm at law, for contribution ..... n. 327
may sue upon express promise to pay for services, when .... n. 327, n. 396
may maintain covenant ..... n. 327
action for breach of contract to become a partner ..... n. 328 *et seq.*
misrepresentation, inducing one to become partner, action for ..... n. 329
action to recover back deposits ..... n. 329
action for fraud, induced by false advertisements, etc ..... n. 329
one partner may sue firm in trespass, when ..... n. 330
in ejectment ..... n. 330
rule generally in reference to actions by one partner against firm relating to real estate ..... n. 330
of the legal and equitable remedies between 322–382
of enforcement of covenants between partners 322
when covenant lies, Marshall v. Coleman 323
when specific performance will be decreed 339, 384–390
covenants against engaging in other business 341
relative to arbitration 342
liquidated damages, covenants relating to 343
when such covenants not applicable 344
covenants are treated in equity as joint and several 345
illustration 345
equity rejects clauses not acted upon 347
all the covenantees must be joined as plaintiffs 348
when the covenants will be treated as several 349
illustration 349
number of plaintiffs may be limited by the contract 349
this applies only to actions between the partners themselves 350
right of action survives to the other covenantees 350
when defect of parties does not appear on face of pleadings, rule 350
when courts of equity will interfere 351
will not restrain act approved by majority of partners unless illegal ... 352
illegal acts will be restrained 352
will interfere to control factious minority 353
will not generally interfere where complainant has been guilty of laches 354
rule in Sherman v. Sherman 354
effect of laches in certain cases 354
when a party is estopped from setting up laches 355
applicability of the doctrine to mining companies 356
advantages of evidence of abandonment 357
rule in McLure v. Ripley 358

PARTNERS — *Continued.* Page.
cases where laches have not been regarded 359
recognition of a claim overcomes laches 362
of the rule that all proper parties must be before the court... 362
who ought to be parties..... 363
rule in Mare v. Malachi..... 364
rule in Turner v. Hill 365
rule when person has been induced to enter into the company by fraud.. 366
suits against executors of deceased partners for fraudulent acts of deceased 366
where some partners may sue on behalf of themselves and others..... 368
exception to the rule that all the partners must be parties to suit for a dissolution..... 366
question of parties dependent upon right to be enforced..... 367
rule when dissolution is not sought..... 371
action to rescind illegal agreements or one illegally entered into..... 369
what must be alleged in bill filed by shareholder on behalf of himself and others..... 370
when such suits may be brought on behalf of others without their consent..... 371
of suits by and against public officers..... 372
rescission of contract..... 373
rule in Pulsford v. Richards..... 374
rule in Jennings v. Broughton..... 374
rule in Robson v. Earl of Devon 375
equity will rescind contract of partnership for fraud..... 376
rule in Rawlins v. Wickham..... 377
bill to recover money invested under fraudulent representations of copartner..... 378
rule in MacBride v. Lindsay..... 380
equitable jurisdiction to rescind agreements generally..... 380
executors of deceased partners, power of, in certain cases..... 380
specific performance, when decreed 382
rule in Bell v. Mixborough..... 382
rule as to note given by partner to secure firm debt..... n. 384
one cannot sue his copartners for fraudulent removal of firm property..... n. 385
remedy in equity in such cases..... n. 385
as to whether must be promise to pay, before action will lie for balance struck..... n. 326–n. 340
one may sue for advances made to copartner..... n. 336, n. 400
for money paid at his request..... n. 336
action lies for share of profits made in other business, when..... n. 336
for share of property purchased with partnership funds..... n. 336
rule as to single ventures..... ..... n. 337, n. 394
action for rent will not lie, when subsequent to lease, lessor becomes partner with lessee..... ..... n. 337
each partner may sue copartner for damages from his negligence... n. 337
rule as to actions against third persons, for damage from fraudulent and collusive conduct with copartner..... n. 338
instances in which action will lie by one partner against fine.. n. 332–n. 339
when he may not..... n. 339 *et seq.*

PARTNERS — *Continued.* Page.
one may sue for breach of contract to furnish capital ..... n. 332
for money lent by one partner to another ..... n. 332
accounting between 429–545
of enforcement of contracts between 392
of legal remedies for and against ..... n. 396
matters accruing before partnership is formed 392
after dissolution 393
when only one item is involved 394
items due one partner, wrongly carried into partnership account 395
in case of independent transaction 397
when assumpsit lies 399
transactions may be separated, when 401
accounting, settlement 403
complete balances 403
agreed balances 403, 405
awards, remedy upon 404
contribution between 407–415, 417
insulated transactions ..... n. 400, 415
one, paying entire debt 417
rule when partnership is dissolved 418
may proceed in equity 418
right to dissolution ..... 420–429, also notes
one partner may be sued on note given for balance of account ..... n. 400
relative rights and powers of, between themselves and third persons, 626–717
of the liability of, for acts of their copartners 626–717
trustee and *cestui que* trust liable in certain cases 628
agreements between, not binding on third persons, unless 629
disclaimer of one, operative when 631
limitations upon the authority of, when operative 632
rule in Hawtayne v. Bourne 633
as regards partnerships 633
each partner general agent for the others 641–654
assignment of partnership property made by one partner 654
liability of firm for acts of individual members thereof 656
ratification of acts done in excess of authority 677
of liabilities for loans effected in firm name 677
for purchases made by one partner 679
for sales made by one partner 682
property pledged by one partner 682
power to pledge 684
of liabilities under bills of exchange, notes, etc 685
power not confined to general partners 686
absence of name of partner does not defeat his liability 687
firm bound by note drawn by one partner in name of firm 695
debt contracted for, but before company was formed 701
of liabilities under guaranties given in firm name 703
must relate to partnership transactions 704
rule in Ex parte Gardam 704
cannot give guaranty outside scope of business 705
of liabilities under acts and assurances in general 706

PARTNERS — *Continued.* Page.
promise of one partner, promise of all ... 706
payment by one, payment by all ... 707
in case of joint and several notes ... 707
rule in Burleigh v. Scott ... 708
payment by assignee of drawer, effect of ... 708
distinction between admission of simple and joint debtor ... 709
admission operative as to one making it ... 710
part payment by one, effect of ... 710
effect of undertaking of one relative to firm business ... 710
one partner may insure for the firm ... 713
cannot submit to arbitration ... 713
general rule as to powers of partner ... 714
signature of one partner binds the firm when ... 715
notice to one, notice to all ... 715
power of one partner in bankruptcy proceedings ... 716
may transfer, assign or otherwise dispose of debt due firm ... n. 626
fact that sale was fraudulent on his part, does not vitiate it ... n. 626
acts done under circumstances that ought to put person on inquiry ... n. 626
cannot pay his private debts with firm property ... n. 626
private creditor taking, gets no title to property ... n. 627
to bind others for act of one, partnership in fact must exist ... n. 627
slight proof of intended fraud, between partner and person dealing with him, effect of ... n. 641
implied power to bind firm by note or bill may be overcome, how ... n. 641
only bound for acts within apparent scope of the business ... n. 626
person taking firm property from one partner, under sale or transfer in excess of his apparent authority, trustee for firm ... n. 626
bound by acts of each, after dissolution, to those having no notice of, n. 642
sale of firm property to pay individual debt, binding if assented to by firm ... n. 644
even after the sale ... n. 644
when liable for bills drawn by one partner ... n. 651
when liable for notes drawn by one ... n. 651
when liable for negotiable paper generally, drawn by one ... n. 651
number of, ordinary, can bind by drawing, accepting or indorsing notes or bills ... 658
can only bind jointly with himself ... 658
power of attorney given by one to another to draw bills, etc., effect of ... 658
non-trading firms, test of authority ... 658
may transfer note or bill, when there is no power to draw ... 659
tender to one, tender to all ... 665
cannot bind firm by deed ... 665
promise made by one, to firm of which he is also member, not binding ... n. 648
money borrowed by one ... n. 657
acts within authority, illustration ... n. 657
member of two firms, cannot bind any except firm for which he is acting 656
may prefer creditors ... n. 655
interest in partnership property ... n. 655
acts of one, act of all ... n. 655, 656–677
one, may make assignment when ... n. 655

PARTNERS — *Continued.* Page.
non-trading partners liable for acts of one, when..... n. 657
power of one to borrow money on credit of firm..... 660
limitation upon authority of, in procuring loans..... 661
power of one to transfer securities..... 664
to receive deed executed to firm..... 664
to receive note or bill for debt due firm..... 664
limitation upon power to compromise debts due the firm..... 665
promise of one, to pay debt of firm, effect of..... 665
must be borrowed for or on credit of firm..... 660
distinction between borrowing, and other acts..... 661
delivery to one, delivery to all..... n. 649
liable for acts of one who assumes to act as agent for, when..... n. 649
one, cannot bind firm by bond..... 665
binds himself by..... 665
may collect rents due under leases executed by firm..... 666
power of one to make guaranty..... 666
promise by one, to acceptor of bill, that firm will furnish funds to meet it, binding on firm..... 667
may sue for firm..... 668
may discontinue suits..... 668, 669
one cannot bind firm by contract for lease, when..... 670
notice to quit, given by one, effect of..... 670
power of one to pledge firm property..... 670
one, cannot mortgage real estate of firm..... 670
notice to one, notice to all..... 671–673
limitations as to effect of notice to one..... 672–673
one may purchase goods for firm..... 673
illustration of rule..... 673
can dispose of any partnership property..... 676
one, may hire servants..... 676
presumption as to loan made by one..... n. 678
firm bound by admission of one, when..... 676
one may bind firm by contract with penalty..... 678
presumption as to power of one to bind firm by notes, etc..... n. 678
firm bound for money borrowed by one, when..... n. 678
presumption as to matters within apparent scope of business..... n. 680
one cannot bind by sealed contract..... n. 697
power as to simple contracts..... n. 698
liable for fraud of one partner when..... n. 710, 719 *et seq.*
when liability attaches..... 722
not liable for willful acts of copartner..... 723
as regards torts..... 724
as regards frauds..... 725
liability of partners for misapplication of money by the members of the firm..... 725 *et seq.*
rule when firm receives money belonging to third persons..... 726
rule in Bromley v. Blair..... 727
rule in Ribeyre v. Barclay..... 727
not liable for frauds in matters not connected with firm business..... 729
not liable for frauds of partner in his own business..... 730

PARTNERS— *Continued.* Page.
not liable for wrongful use of trust funds in hands of one partner..... 732
liability for false representations of one partner..... 734
copartners not liable when act is in excess of real or apparent power... 735
liability of companies for frauds of directors..... 736–740
effect of circulars, reports, etc., issued by company..... 740
when may be used against the company..... 741
liability of directors for frauds by issuing false circulars, etc..... 742
negotiable securities fraudulently issued, valid in hands of *bona fide* holder..... 742
rule in Lacy v. Walcott..... 743
rule in Sanderson v. Brocksbank..... 743
liable for fraudulent acceptances..... 744
rule in Rapp v. Latham relating to fraudulent contracts of one partner.. 744
firm giving facilities for commission of frauds must abide the consequences..... 745–749
firm cannot obtain title through fraud of one partner..... 749
firm liable for connivance at fraud in certain cases..... 749
acts must have been done as a partner..... 750
of liability for torts of partner..... 752
when action may be against all..... 752
when may be against one or all..... 753
rule in King v. Manning..... 754
when only one is liable..... 754
executing instrument invalid as to firm, is bound himself..... 764 *et seq.*
when exempt from liability..... 755–765
where contract is by deed..... 755
no implied power to bind by deed..... 757
bond made by one partner, binding on firm when..... 758
American doctrine..... 759
rule does not extend to releases..... 760
releases by deed..... 762
warrant of attorney..... 762
submission to arbitration..... 762
the partner executing is bound..... 764 *et seq.*
of the formation of the relation..... 2
partners *inter se*..... 7, n. 27
ostensible, nominal and dormant partners..... 11
rights of partners to enforce partnership claims..... 15
who are liable as partners to third persons..... 16
contract must be voluntary..... 16
equity will not compel admission of stranger into firm..... 18
executors or representatives of deceased partners, rights of..... 18
when one not a partner in fact may be charged as such..... 19
number of partners..... 21
who may be partners..... 21
infants..... 22
alien friends..... 23
married women..... 24
corporation may be partners..... 25
capital..... 26

PARTNERS — *Continued.* Page.
communion of profits 27
partners in profits but not in the goods 27
what is meant by communion of profits 30
various modes of creating partnership liability 37
rule in Fox v. Clifton 40
rule in Pott v. Eyton 42
rule in Newsome v. Coles 42
estate of deceased partner not liable when business is continued in old name 43
when person holds himself out as partner 43
person liable on principles of agency 44
sub-partnerships 44
general and particular partnerships 46
clubs and societies 46
parties who retain specific shares of property 48
mutual interest in profits must exist 49
factors and brokers receiving commission 49
selling goods for what can be got over a certain price 50
peddler supplied with goods to sell on commission 51
shipowners, ships' crews, shipmasters, etc 53
must be a right in profits as result of the venture 54
purchasing goods for share of profits 54
carrying on lands for share of crops 55
instances where sharing in profits only was held to create partnership .. 55
furnishing materials for another to manufacture 57
lands conveyed to two or more 57
renting lands for share of profits 58
joint venture and agreement to share profits and losses 58
loaning money for share of profits 59
joint interest in profit and loss 59
person who shares losses as well as profits 59
share of profits as measure of compensation 63
sailing vessel on shares 65
capital against services 74
pooling of earnings 85
profits as a measure of compensation 63
receiving interest or annuity for money lent to the firm does not make the person receiving it a partner 95
money loaned to be used as capital 95
tendency of American courts to adopt English rule 95, 100, 103
English rule as embraced in Bullen v. Sharp, and other cases 98, 101
Pennsylvania doctrine—Hart v. Kelley 100
Illinois—Smith v. Knight; Lintner v. Milliken 101
Ohio—Harvey v. Childs 100
rule in Grace v Smith 96
when the amount is uncertain or dependent on accidents of trade 103
contingent interest in profits 104
may be partnership in any lawful business 104
cannot be partnership in mere personal office 112
particular adventures 113

PARTNERS — *Continued.* Page.
trade must be lawful ... 113
must not involve breach of the law ... 114
rule in Booth v. Hodgson ... 114
money advanced for formation of illegal partnership ... 115
courts of equity will not aid parties—Aubert v. Maze ... 116
rule in Watts v. Brooks ... 116
debts arising from notes illegally issued ... 117
effect of repeal of certain English statutes ... 118
contract intended to evade usury laws ... 119
rule in Morse v. Wilson ... 120
rule in Morisset v. King ... 120
rule in Gilpin v. Enderbey ... 121
rule in Fereday v. Hordern ... 123
contrary rule in Brophy v. Holmes ... 123
when persons are restricted by law from entering into partnership ... 124
partnership in business when either is not legally qualified ... 125
cases illustrating ... 126
partnership in business requiring license ... 130
must infringe the law in order to be void ... 130
rule in Brown v. Duncan ... 131
rule founded on principles of policy ... 132
of the nature of the interest ... 179
specific lien of each partner ... 186
of joint estate ... n. 179
separate estate ... n. 181
conversion of joint into separate ... n. 184
rule in Ridgeley v. Carey ... 193
share of deceased partner ... 195
severance of joint tenancy upon death of partner ... 202
real estate used for partnership purposes ... 206, n. 207–240
how courts of equity regard such estate ... 207
distinction between legal and equitable estate ... n. 216
rule in Thornton v. Dixon ... n. 217
rule in Ball v. Phyn ... n. 217
rule in Randall v. Randall ... n. 217
rule in Cookson v. Cookson ... n. 218
rule in Townsend v. Devaynes ... n. 218
rule in Phillips v. Phillips ... n. 218
rule in Morris v. Kearsley ... n. 218
rule in Houghton v. Houghton ... n. 219
American doctrine ... 220
when there are restrictions in the deed ... 213
when one partner takes lease in his own name ... 229
right of surviving partner to sell ... n. 228
when real estate is not treated as personalty ... n. 227
good-will ... 238
effect of death upon interest of deceased partner in stock ... 242
rights and obligations of, under contract ... 274
grounds upon which specific performance is decreed ... 275
when contract is continuous and profits uncertain ... 275

PARTNERS — *Continued.* Page.
action for damages for breach of contract ... 276
rule in Herry v. Birch ... 276
when equity will enjoin dissolution ... 277
what must be shown to maintain action for damages ... 278
rules for construction of contract —Gainsborough v. Stark ... 279
how far acts of partners affect construction ... 280
nature of business ... 282
time when partnership begins ... 286
term of ... 286
style of firm ... 287
shares to be advanced ... 288
several rights in real property ... 290
profits to be distributed ... 293
personal duties of partners ... 293
keeping proper books ... 293
exercising same trade on separate account ... 293
express stipulations against ... 293
Expressio unius est exclusio non ... 294
when partner retires before term is ended ... 295
decision of differences by the majority ... 295, n. 282
acquiescence in deviation from terms of contract, effect of ... 296
annual account ... 296
when equity treats provisions of contract as waived ... 296
errors may be stipulated against ... 297
general account upon dissolution ... 297
executors or legatees carrying on trade of deceased partner ... 297
power of appointment need not be strictly executed—Rule in Ponton v. Dunn ... 298
construction of clause for substitution ... 299
representative of deceased partner must conform to terms of will ... 300
executors treated as partners in certain cases ... 301
when children succeed to business of deceased partner ... 301
expulsion clause ... 302
arbitration ... 302
partnership by deed must be dissolved by deed ... 303
liquidated damages ... 304
when real estate is subject of arbitration ... 304
deed of dissolution must be specified as to time when it takes effect ... 304
what such deeds usually contain ... 305
when retiring partner leaves capital in the firm ... 305
taking annuity does not create liability as partner ... 306
effect of taking usurious interest ... 306
incoming partners ... 307
rule when partners are indebted to firm — Simpson v. Rackman ... 316
deed of trust made by one partner ... 317
rule in Belcher v. Sikes as to deed of dissolution as to individual matters ... 317
as to ownership of stock ... 318
courts of equity will not relieve, except ... 320
of accounting between, usually consequent on dissolution ... 430

PARTNERS — *Continued.* Page.
rule as to bill for accounting without praying for dissolution....431, 438–442
contrary rule in Loscombe v. Russell..... 431
when an account will be decreed..... 442
executors of deceased partners entitled to an account..... 443
sub-partner has no right to an account from firm..... 443
rights of creditors and legatees of deceased partner..... 444
limited account without dissolution..... 444
instances in which limited accounts may be had.....445 *et seq.*
who may seek an accounting..... 450
what must appear in bill for..... 451
what defendant partners must do..... 451
relative to production of books, etc..... 453
who is entitled to inspection of..... 454
of defense to bill for accounting..... 455
denial of partnership..... 455
statute of limitations.....456–460
account stated..... 460
award..... 462
payment and accord and satisfaction..... 463
release..... 465
of the decree..... 464
just allowances, what are..... 465, 540
period over which account extends..... 465–471
evidence on which accounts are to be taken..... 472
outlays and advances..... 473
liability for useless outlays..... 474
outlays not chargeable if particulars refused..... 475
of debts, liabilities and losses..... 476
not always bound to contribute to losses..... 476
must contribute to loss from *bona fide* act..... 477
guilty of fraud or bad faith loss must be borne by partner guilty of... 478
firm responsible for losses from wrongful acts of servants, though employed by one partner..... 478
unauthorized act, neglect or fraud, of partner ratified by firm..... 479
when all are in *pari delicto*..... 482
firm liable for illegal acts of partners..... 480
doctrine denying contribution as to wrong-doers not applicable to partners..... 480
of interest..... 482
of division of profits and dividends.....483–486
foundation of right to contribution..... 486
of right of agent to indemnity from principal..... 487
agent who executes orders..... 488
acting without instructions..... 488
of right of partners to indemnify.....491–495
when accounting will be decreed.....495 *et seq.*; n. 495
of the payment of partnership money into court..... 497
when defendant must pay money into court..... 498
when money in hands of partner is debt to the firm..... 499
interest on profits in hands of partner..... n. 542

PARTNERS — *Continued.* Page.
of sale under a decree 501
when firm is dissolved by bankruptcy or death 501
rule in Crawshay v. Collins 502
rule in Featherstonhaugh v. Fenwick 502
rule in Wilson v. Greenwood 503
rule in Cook v. Collingridge 503
rule upon dissolution of partnership at will 505
practice, when an account is decreed 505
how the accounts must be taken when provision is made therefor in the contract ..... 506–509; also n. 3, p. 506 *et seq.*
when no provision therefor is made in the contract 508
how the account is to be taken generally ..... n. 506–n. 518 510
matters to be considered in taking 516–521
how the value of the joint property is to be arrived at 521
good-will, value of, how ascertained 521
what is treated as firm property ..... n. 522, *et seq.*
rule when remaining partners continue the trade ..... 522, n. 528
right of assignee of bankrupt partner to share of profits 529
allowances for skill and services of surviving partners 532
survivor's rights and powers 533
dissolution by bankruptcy, accounts how taken 538
rights of executors 535
dissolution by death of partner 539
when copartner is made executor 540
interest on profits in the hands of a partner 542
costs 544
one may sell entire property of firm ..... n. 710
right to compel application of firm property to payment of firm debts ..... n. 189 *et seq.*
lien of partners, extent of ..... n. 190
not liable on contracts several in law 766–784
contract executed by one partner only 766
advancing money on security of one 767
principle on which firm is charged ..... 769, n. 770
when loan to one becomes debt of firm 771
rule in Ex parte Raleigh explained 773
creditor must have acted with due caution 774
when the contract is in fact made with firm 775
rule in Denton v. Radie 777
contract with one partner 778
may bind firm in its usual transactions 779
contract to take a part of firm, for debt 780–783
contract as affected by custom of trade 783
may limit power of copartner by express notice ..... 630, 632, 635, n. 641
cases illustrating 631, 636
general powers of ..... 633 *et seq.*; also n. 641
when notice of excess of authority is important 634
fraud of one, does not prevent liability 635
firm not liable to one, who knows partner is acting beyond authority 637
transactions known to inure to his sole advantage 637

PARTNERS — *Continued.* Page.
cases illustrating rule that firm is not liable when person knows contract inures to his own advantage 637
have no power to pledge firm property to pay private debts 637
restrictions upon authority of partner not binding on third persons 639, 641
unless persons dealing with him have notice thereof 639
Galway v. Morris 640
test of authority ..... 641–654 and notes.
not bound by notes by one outside apparent scope of business, when n. 680, n. 686
restrictions on powers of one, not binding, when ..... n. 686
may be charged for unauthorized act of one, when previous dealings have been such as to indicate special authority ..... n. 794
agreement between, to purchase one class of goods, does not warrant purchase goods of another class ..... n. 794
hand-bills issued by one, not binding on firm, unless ..... n. 794
when firm not bound by purchases made by one ..... n. 794
retiring, liabilities of 842–924
See RETIRING PARTNERS.
powers of each ..... 792, n. 2 *et seq.*
persons may deal upon faith of apparent authority of ..... n. 793, n. 794
must not deal in excess of, illustration ..... n. 793
in mercantile business, not bound by note in firm name, for furniture. n. 793
in mechanical business, not bound by note for diamonds ..... n. 793
in non-trading firms, not bound by note or bill, except ..... n. 793
liability of incoming 823–841
liability of estate of deceased partner 925–973
remedy at law ..... 926, n. 935
rule in Gray v. Chiswell 927
partnership debt, several as well as joint, in equity 929
rule in Devaynes v. Noble 930
confirmed in Wilkinson v. Henderson 932
rule carried still farther in Thorpe v. Jackson 933
joint and several contracts 936
rule in equity when partners enter into a joint security 936
rule does not apply to all transactions—Sumner v. Powell 937
partnership creditors, rights against a deceased partner's estate—Vulliamy v. Noble ..... n. 935, n. 938
admission of survivor of representatives of a deceased partner—Braithwaite v. Brittain—Winter v. Innes 939
subsequent dealings with the new firm 940
acts in discharge of deceased partner's estate—Jacomb v. Harwood 940
rule in Winter v. Innes 941
payments made in case of decease of one of the partners—Devaynes v. Noble 944
Sleech's case—Clayton's case 945
liability in case of continuance of firm under will of deceased 947
creditors of new firm not entitled to pursue the estate 947
Ex parte Garland 948
executor carrying on business liable for excess of authority 948
rule in Wightman v. Townall 949

PARTNERS — *Continued.* Page.
consequences of death of a partner ... 949
relative rights of executor and surviving partner ... 949, n. 950
with reference to what occurred before death ... 954
creditors may pursue estate in equity ... 955
position of firm creditors as to individual creditors of deceased partner, 957
rule in Brett v. Beckwith ... 958
substance of decree in such cases ... 958
questionable whether both remedies can be pursued at once ... 960
with reference to what occurred after death ... 961
what acts of an executor impose liability upon assets of deceased partner ... 962
cases illustrating ... 963
effect of provision in will directing continuance of business ... 964
in the case of companies ... 965
consequences as to separate creditors, legatees and next of kin of deceased partners ... 966
general rule as to separate creditors ... 966
exceptions to the rule ... 968
when share of deceased, is not got in ... 969–973
See SURVIVING PARTNERS; EXECUTORS.
liability of, how extinguished ... 974–980
discharge of all by act of one ... 974
composition deed, treated as release ... 975
may be limited to one partner ... 975
covenant not to sue, is not a release ... 977
payment by one, payment by all ... 978
rights of, against third persons ... 982–1003
relation gives no new rights ... 982
limits of right ... 983
under sealed instruments—bonds—rule in Wright v. Russell ... 983
rule in Barclay v. Lewis ... 984
Barclay v. Lewis overruled by Barker v. Parker ... 985
rule in Strange v. Lee ... 985
bond for repayment of money advanced by firm or either member of, does not protect advances by survivor ... 986
rule as to bond to cover bills drawn by firm ... 987
effect of death or retirement of partner upon bond of indemnity to firm, 987
bond conditioned for good behavior of collector of firm ceases to be operated, when ... 987
effect upon such bonds when firm is afterward incorporated ... 988
same principles applied in equity—Pemberton v. Oakes ... 988
introduction of new partner—effect of, on such bonds ... 988
bond may be made so as to cover fluctuations and changes in composition of the firm ... 989
who may recover on bond given to firm in firm name ... 989
bonds to companies, not affected by changes in members of ... 990
what submission to arbitration covers—Garland v. Noble ... 990
power of attorney given to one member—effect of ... 991
rights of partners under unsealed contracts—rule in Ex parte McGae ... 991
guaranty given to one partner, not guaranty to firm ... 992

PARTNERS — *Continued.* Page.
simple contracts may be enlarged or explained by construction. Ex parte Kensington ... 993
guarantees given to one partner may in some cases be extended to firm —Garrett v. Handley ... 994
Alexander v. Barker ... 995
bills and notes, generally security only to one to whom payable—Exceptions ... 996
rule when contract by mistake fails to express the intention of the parties ... 997
rights of partners as to accounts current with their debtors—Bodenham v. Purchas ... 998
Bodenham v. Purchas questioned in Jones v. Maud ... 999
of extinction of rights. Payment to and release by one partner. Effect of ... 1000
payment to one partner—King v. Smith ... 1001
distinction when the debtor owes both the partner and the firm ... 1002
judgment taken by one of two joint creditors. Effect of ... 1002
payment to one of two firms that are partners in certain transactions ... 1003
of actions by partners ... 1004–1046
general rights of, to sue ... 1004, n. 1024
of parties to action *ex contractu* ... 1009, n. 1062
must have been partnership when contract was made ... 1013
distinction between specialties and simple contracts ... 1017
parties to actions on bills and notes ... 1017, n. 1010
surviving partners ... n. 1026
cannot sue in firm name ... n. 1024
as to firms having common member ... n. 1005
actions by and between partners ... n. 1006
bill in equity ... n. 1006
actions on specialties ... n. 1010
on contracts generally ... n. 1011
dormant partners need not be joined ... n. 1012, 1020
all ostensible partners must join ... n. 1012
on implied contracts ... n. 1012
on written contracts ... n. 1012
when one may sue alone ... n. 1013
when one should sue alone ... n. 1013
action *ex delicto* ... n. 1014, 1029, n. 1028
nominal partner ... 1023
right of action cannot be transferred when ... 1018
parties to actions on deeds ... 1019
dormant partners ... 1020, n. 1021, n. 1062
partners not known in firm ... 1020 *et seq.*, n. 1062
infant partners ... 1024, n. 1062
bankrupt partners ... 1025, n. 1062
death of partner ... 1026, n. 1060
demurrer in case it appears there should be other parties ... 1026
of the parties to an action *ex delicto* ... 1027
of the declaration ... 1031
joint interest, joint action ... 1031, n. 1062

PARTNERS — *Continued.* Page.
libel ... 1034
of pleas in bar ... 1035
of plea of bankruptcy ... 1035
in actions on bonds ... 1035
tender ... 1036
former recovery ... 1036
statute of limitations ... 1036
proof of partnership ... 1036
how proved ... 1037
when one sues alone on partnership debt and no plea is filed or objection taken, rule ... n. 1029
when one sues and recovers in respect of his share, defendant estopped from setting up want of parties in suit brought by other partners for their share of the same debt ... n. 1029
what acts of creditor discharge one of the firm ... n. 1095
when all are dead, executor of one last deceased must sue ... 1068
when one partner may sue alone ... n. 1029
how liability as, may be established ... 1109–1134
pleadings in actions against ... 1068–1108
all must be joined as defendants ... 1076
rule when too many are joined ... 1069
must be jointly declared against ... 1054
must be sued by individual names ... 1053
executions against ... 1140–1146
equitable remedies against ... 1044
when part owners of ships are ... 1169–1197
dealing with, knowingly in excess of authority ... n. 78
distinction between participation in, as profits, and as measure of compensation ... n. 77–n. 84
cases illustrating ... n. 77–n. 84
interest in, that creates partnership ... n. 78–n. 84
receiving share of, as measure of compensation, does not create partnership ... 90–93
receiving share of, for loan of money, effect of ... n. 95–n. 102
conflicting doctrine in relation to ... n. 95–n. 102
contingent interest in, creates partnership ... 104
cases illustrating ... 134 *et seq.*
loan to firm, taking interest and specific sum in lieu of profits ... 134 *et seq.*
agreement to share, creates relation of, when ... 139
partnership in, when ... n. 181 *et seq.*
made by one partner must be divided with firm, when ... n. 259 *et seq.*
must be distributed, how ... 292

See PART OWNERS OF SHIPS; INCOMING PARTNERS.

PARTNERS INTER SE:
who are ... 7
parties must intend to become ... 7–n. 10
money loaned for share of profits does not make parties partners in fact ... n. 8
intention of parties, how ascertained ... n. 7
must be gathered from contract, if there is one ... n. 7

PARTNERS INTER SE — *Continued.* Page.
if no contract, method of dealing with property may be shown..... n. 7
joint purchase of goods does not make..... n. 9
parties may be, when they share neither in the profit or loss..... n. 9
liable for debts of firm, whether known as partners or not..... 12
what is essential to constitute..... 27–30
who are..... n. 4, 27
communion of profit, essential to create..... 27–30
illustrations..... n. 427
may stipulate against liability, effect of..... 28, n. 30
surviving, carrying on business with assent of executor..... 30
agreement to share profits and loss, creates..... n. 29
sharing in profits, *prima facie*, establishes..... n. 33
illustrations..... 33–n. 34
agreement to share profits and loss, creates..... 62
loan to person to be employed in trade for share of profits, does not create 92

PARTNERSHIP:
definition of, by Tindal, C. J..... 2
Grotius..... 2
Domat..... 2
Pothier..... 3
Story..... 3
Puffendorf..... 3–4
Gow..... 3
Watson..... 3 *et seq.*
forms for agreements for..... 1513
foundation upon which it rests..... 2
various definitions of..... 2–n. 6
is voluntary contract..... n. 3
is either general or special..... n. 3
how regarded in the civil law..... n. 3
in the French law..... n. 4
by the common law..... n. 4
incorporated companies not partnerships..... n. 4
private partnerships, what is..... n. 5
how formed..... n. 5
parties cannot be partners unless they consent to be..... n. 5
may be held as such by third persons when not partners in fact..... n. 5
persons showing profits and losses, partners..... n. 6
in purchase and sale of lands, may exist and be proved by parol..... 7
may arise from tacit agreement of parties..... n. 9
joint purchase of property, and sharing in profits and losses of..... 10
joint ownership of property creates partnership, when..... n. 10
mere division of profits does not create..... n. 9
nor receiving share of profits in lieu of rent..... n. 9
showing in profits as compensation for services, does not create.. n. 9 n. 10
running saw-mill upon shares does not create..... 9
taking share of profits in lieu of rent..... n. 9
joint purchase of property does not create..... n. 9
agreement to share commissions does not create..... n. 10
definitions of..... n. 2–n. 6

PARTNERSHIP — *Continued.* Page.
may be created by parol contract ... n. 8 n. 11
even for the purchase and sale of lands ... 8 n. 11
must be joint interest in profits ... n. 8
elements requisite to establish ... n. 7–10, 46–48
how proved ... n. 11–13
kinds of ... 4–n. 5
private partnership, what is ... n. 5
how formed ... n. 5
unincorporated companies are ... n. 4
incorporated companies are not ... n. 4
common law rule as to ... n. 4
community of interest does not create ... n. 8
must be joint interest in profits to create ... n. 8
illustration ... n. 8
must be joint right of control over the partnership property and business ... n. 8
advancing money, and agreeing to share losses does not create ... n. 8
dividing gross earnings of independent business does not create ... n. 8
must be joint venture, and sharing of profits and loss ...
parties are, when they agree to be, whether they share in profits or loss or not ... n. 9
working farm upon shares does not create ... n. 9
arrangement by one to furnish a house and another provisions does not create ... n 10
boat, sailing on shares ... n. 10
furnishing hides to one to sell on shares ... n. 10
inter se, how may be proved ... 11–12
running mill upon shares does not create ... n. 13
gross earnings, sharing, does not create ... n. 13
factory, running for percentage of avails ... n. 13
salary on percentage of profits ... n. 13
need not be proved, unless denied, by parties suing as partners ... n. 15
defendant may show under general issue that plaintiffs are not partners ... n. 15
liability, how created ... 37–43
person filing bill against firm for an accounting must prove that he is partner ... 16–17
contract of, must be voluntary ... 16
strangers cannot be admitted into, except ... 16, n. 17
must be proved to exist between persons who sue as partners ... 15
subpartnership, what is ... 44
general and particular, what is ... 46
resulting from sharing in profits, rules applicable to ... 45
in separate ventures, duration of ... n. 30
agreement to share profits and losses creates ... n. 29
person reaping advantages of, rule as to ... n. 1, 32
may exist without other capital than skill or labor ... n. 34
may exist in profits only ... 27, n. 34
between publishers and authors ... n. 34
when loan of money for share of profits creates ... n. 35

PARTNERSHIP — *Continued.* Page.
joint purchase of property does not create ... 36
to create relation in fact, each must have right of control over stock. n. 37
surgeon selling business for share of profits of ... n. 37
furnishing material for another to manufacture creates, when ... n. 37
when not ... n. 81–n. 85
joint ownership does not create relation ... n. 37
when it does ... n. 38
pooling of earnings does not create ... 85–90
holding out that creates ... 88–90
carrying on debtor's business by creditors creates, when ... n. 85
manufacturer receiving stock to manufacture on shares ... n. 81
cattle, keeping and selling on shares ... 89
shipowner receiving share of profits of voyage does not create, with owners ... 53
selling goods for commission ... 49, n. 51
selling for share of profits ... n. 51
selling for all above certain price ... 50
selling by peddlers for share of profits ... 51
expenses, sharing in, distinction between, and losses ... 51
brokers, selling for share of profits ... n. 51
between principal and agent, does not exist ... n. 49, n. 51
shipmaster not partner with owners of ships ... 53
ferry, running for share of profits ... n. 52
interest in profits, necessary to create ... 54
purchasing goods for share of profits ... 54
tannery, running for share of profits ... n. 51
factory ... n. 51, n. 52
joint interest in profits and loss creates ... 59
illustration of the rule ... 59
exists when parties agree to become ... 59
share of profits for rent of premises creates, when ... 59
loan of money for share of profits creates, when ... 59
factors or brokers sharing in losses as well as profits ... 60
must be interest in profits, as such ... 61
sharing in gross returns does not create ... n. 61
may be in profits, merely ... n. 61
taking share of profits of tavern in lieu of rent does not create ... n. 66
stage-owners, agreement between that bind them as partners ... 63
advancing money to another to buy property for share of profits, does not create ... n. 66, n. 69
carrying on plantation for share of crops ... n. 66
pasturing cattle for share of profits from sale of ... n. 67
name may be of individual, or fanciful ... n. 75
the words & Co. indicate, but who composing must be shown by person seeking to charge ... n. 75
sub-partnership, what is ... 76
persons may exist against intention of parties ... n. 76
in a single transaction ... n. 70
loan to person for interest in profits, creates, when ... n. 70
when not ... n. 70

PARTNERSHIP — *Continued.* Page.
participation in profits, as part compensation for loan creates, when n. 70–n. 75, 95–n. 102
English doctrine as to ..... n. 95
growth of, in this country ..... n. 100
cases illustrating 100–n. 102
interest in profits that creates, *inter se* ..... n. 72
leading feature of ..... 72, n. 73
may be, in any lawful business 104–112
but not in illegal business ..... n. 104–n. 110
illustration ..... n. 104–n. 110
to create, must be reciprocal agreement to unite stock and share risks of business 92
distinction between, and corporations ..... n. 106
established by fraud, persons induced to join, may recover back money paid in ..... n. 108
cannot be in personal office 112
to be valid, trade must be lawful 113–132
in business requiring license, illegal when ..... 130 *et seq.*
cases illustrating 131
time of dissolution of 148
at will, presumption as to continuance of ..... 148 *et seq.*
causes of dissolution ..... n. 149 *et seq.*
expiration of time of ..... n. 151
marriage of feme sole ..... n. 151
mutual consent ..... n. 151
death of one partner ..... n. 151
assignment by partner, or firm ..... n. 151, 161, n. 162
bankruptcy by one, or firm ..... n. 151
sale by one, of entire interest in firm ..... n. 151
withdrawal of partner ..... n. 151, n. 163
introduction of new partner without consent of all 151
by war, in certain cases ..... n. 151
business becoming unlawful ..... n. 151
causes for which court will decree dissolution ..... 151, 152 *et seq.*
by reason of misconduct of partner ..... n. 151
by neglect to furnish share of capital as agreed ..... n. 163
degree of, required to be established ..... n. 151
extravagance ..... n. 149, n. 151
incapacity for business ..... n. 149, n. 151
negligence ..... n. 149, n. 151
absconding of partner ..... n. 149, n. 151
felony ..... n. 149, n. 151
habitual intoxication ..... n. 149, n. 151
dissensions between partners ..... 149, n. 151
incompatibility of temper ..... n. 149, n. 151
insanity of partner ..... n. 152 *et seq.*
fraud ..... n. 149, n. 151
gross violation of good faith ..... n. 150
immoral conduct ..... n. 149, n. 151
duration of, may be implied in certain cases ..... n. 157

PARTNERSHIP — *Continued.* Page.
equity will entertain bill for dissolution of, at will, when account or receiver is prayed for ..... n. 155
equity will restrain dissolution of, at will, when great loss may ensue therefrom ..... n. 155
insolvency cause for dissolution of ..... n. 162
for a term, how dissolved ..... n. 157, n. 166
quasi, how dissolved 168
notice of dissolution, how must be given ..... n. 163–n. 164
property of partners in 179–254
lien of partners on ..... 186, also n. 2
real estate purchased by and for ..... 206 *et seq.*
good-will 236
presumption that property bought with firm money is firm property may be rebutted ..... n. 180
property not recognized as ..... n. 227
good-will 238
when begins 286
style of firm 287
for a time cannot be dissolved by one partner ..... n. 421–n. 425
in case of attorneys ..... n. 422
limited to a particular business, note made by one, for other than such business, must be shown to have been made by authority of other partners ..... n. 793, n. 794
see illustration in reference to law firm ..... n. 794
liability commences when ..... n. 309
when consummated ..... n. 309
trade-mark, property ..... n. 240
stock, what is regarded as 522
accounting between partners, rules relating to 430–544
must be proved, in an action for an accounting 455, 621
firm liable for act done for the firm, although person supposed he was dealing with one partner only ..... n. 645
transactions by one partner regarded as for firm, although he deals with his own money, when ..... n. 645
declaration of partner that he was dealing for firm, not enough to bind him therefor ..... n. 645
sale to one partner, sale to firm, when ..... n. 646
physicians, firm of, non-commercial 648
securities, appropriated to pay debt of one partner 792
Smith v. Burridge 792
limited to particular business, note given by one outside such business, must be shown to have been made with authority ..... n. 793
carried on under name of one partner, all are bound by note given by him in his name for firm obligation ..... n. 688
liability commences when ..... 804 *et seq.*; n. 816
how may be proved ..... n. 804 *et seq.*
existence of, may be implied ..... n. 804
time fixed in contract controls, unless 804
not generally liable for debts created before, was on foot 804
when liable for goods ordered before 805, 813, 831

PARTNERSHIP — *Continued.* Page.
time fixed in contract, not always decisive, as against third persons..... n. 806
in order to establish partnership, agreement to become partners must have been entered into..... n. 806, n. 816
illustrations..... n. 806 *et seq.*
liability for acts of each partner..... 626–717
See PARTNERS.
distinction between a contract of, and one for, at a future time..... n. 808
no partnership unless terms fully agreed on..... n. 808 *et seq.*; n. 816 *et seq.*
goods supplied to one, before commencement of, firm not liable for..... 819
Smith v. Craven..... 820
money loaned to one, before partnership begins, not chargeable to firm. 819
validity of clauses of contract of, for introduction of new members. 831 *et seq.*
new members may be introduced into when..... 831 *et seq.*
in mines..... 1160–1168
subject to rules of ordinary partnership..... 1160
rights of co-adventurers..... 1160
cases illustrating..... 1160
rights of mortgagees of mining shares..... 1163
shares in, assignable..... 1164
person liable as partner in, when holds himself out as such..... 1166
no implication as to power of directors or agents to draw bills..... 1167
provisions of codes and ordinances..... 1167
how may be established..... 1109–1134
executions against..... 1140–1146
in ships..... 1169–1197

PARTNERSHIP NAME:
is a partnership asset when..... 572
when each of partners may carry on business in name of old firm..... 572

PARTNERSHIP AT WILL:
intention to dissolve must be communicated to other partners..... 157
courts will entertain bill to dissolve when an account, or appointment of receiver is prayed..... n. 155
court will, when great loss is liable to ensue therefrom, restrain immediate dissolution..... n. 155

PARTIES:
instances in which all will not be, to bill for dissolution..... 366
question as to who should be, depends on right to be enforced 367
when dissolution is not sought..... 368
when one may sue for benefit of others, without consent..... 370, 371
one member of, cannot sue the firm..... n. 322
one firm cannot sue another having a common member..... n. 323, n. 325
assignee of one partner cannot sue firm..... n. 323, n. 325
all covenantees must be parties to action..... 348
number of plaintiffs may be limited in certain cases..... 349
who ought to be..... 362, 363, 366, 367, 368
necessary to bill in equity..... 611, 614
who necessary to bill for accounting..... 611, 614

PARTIES — *Continued.* Page.
to an action for an accounting, who should be ..... n. 439, n. 495
incoming partner must not be joined as plaintiff or defendant in suits relating to old firm 833
to actions in favor of partners 1004–1046
in actions *ex contractu* ..... 1009, n. 1012
in actions on specialties 1017, 1019
in actions *ex delicto* ..... n. 1014, 1027, n. 1028
to actions on deeds 1019
on notes and bills ..... n. 1010, 1017
libel 1034
joint interest, action must be joint 1031
infant partners 1024
bankrupt partners 1025
surviving partners 1026
dormant partners ..... 1020, n. 1021
partners not known in firm ..... 1020 *et seq.*

PATENT:
joint owners of, not partners ..... n. 87
paying proportion of profits from sale of 58
interest in profits of, does not create partnership .. n. 70, n. 72, n. 79, n. 83
that does ..... n. 83
selling for share of profits, does not create partnership 92

PAYEES:
of notes or bills acting in bad faith will be restrained when 557

PAYMENT:
by one partner, payment as to all ..... n. 334, n. 335
as defense to bill for accounting 463
by one partner payment by all 707
part, by one, effect of 710
made after decease of partner 944
to one partner, payment to all ..... 1000 *et seq.*
by one partner, payment by all 978
to one of two firms that are partners 1003
plea of 1195
See ACTIONS.

PEDDLERS:
selling goods for share of profits 51

PHYSICIANS:
one of a firm of, cannot pledge credit of firm for a loan 648
cannot give note or bills except ..... n. 687, n. 793

PLAINTIFFS:
number of, may be limited by contract 349
but only as between the parties 350

PLEADINGS IN EQUITY. See EQUITY; ACTIONS.

PLEAS:
in bar 1035
statute of limitations 1036

PLEAS — *Continued.* Page.
former recovery ... 1036
bankruptcy ... 1035
tender ... 1036

PLEA:
when defense is joint, all may join in same plea ... 1108
in bar, nature of ... 1091
See ACTIONS.

POOLING OF EARNINGS:
does not create relation of partners ... 85
cases illustrating ... 85–90

PLEDGE:
partner has no power to, firm property for his own debt ... 637
power of one partner to ... 682, 684

POTHIER:
definition of partnership by ... 3

POWER OF ATTORNEY:
given by one partner to another, effect of ... 658
covers what, and effect of ... 991

PRINCIPAL AND AGENT:
principles applicable to, as test of liability ... 44

PRIVATE PARTNERSHIP:
what is ... n. 5
how formed ... n. 5

PROFITS:
agreement to share, evidence of partnership, when ... n. 11
community of, what constitutes ... n. 13
percentage of, for services ... n. 13
mere division of, does not create partnership ... n. 9, 48
must be joint interest in ... n. 8, 33
need not be equal ... 33
sharing in, does not necessarily create partnership in fact ... n. 33, 47
mutual interest in, must exist ... 49
interest in, for services rendered ... 49
agreement to share from sale of particular parcel of goods does not create partnership ... n. 10, 47
wool furnished by different persons and sold under agreement to divide profits ... n. 10
prima facie effect of agreement to share ... n. 32
communion of, essential to create partnership *inter se* ... 27–30, n. 1, 32, 47
illustrations ... n. 4, 27
agreement to share, and losses, creates partnership in fact ... n. 29, n. 1, 32
sharing in, *prima facie* effect of ... n. 33, n. 61
may be partnership in ... 27, n. 34, n. 61
what are ... n. 61
as measure of compensation ... 63–93
illustration ... 68
participation in, that creates partnership ... 65–n. 75

PROFITS — *Continued.* Page.
taking share of, of tavern in lieu of rent ..... n. 66
must be right to account for ..... n. 65
partners in ..... n. 67
receiving commission on, does not create partnership ..... n. 68
must be interest in, as result of venture 54
profits ..... n. 61
illustration ..... n. 61
of business, sharing in, held to create partnership, when ..... n. 70
purchasing goods, for share of ..... n. 69
illustrating. Rice v. Austin ..... n. 69
participation in, as part compensation for loan 70–n. 75, 95–n. 102
English doctrine as to ..... n. 95
growth of, in this country 100–n. 102
interest in, that entitles to accounting ..... n. 71
interest in, that creates partnership ..... n. 72
participation in, for services, does not create partnership ..... n. 73
community in, to create partnership in fact ..... n. 74
and loss, sharing in, creates partnership ..... n. 83
interest in, that creates partnership ..... n. 79
commission on, receiving, effect of ..... n. 81

PROSPECTUSES:
es evidence to establish partnership ..... n. 1113

PUBLIC POLICY:
cannot be partnership in business, opposed to ..... n. 104–n. 110

PUBLISHERS AND AUTHORS:
effect of agreement between, to share in profits of publication ..... n. 34

PUFFENDORF:
definition of partnership by 3

PURCHASES:
made by one partner, liability of firm for 679

Q.

QUASI PARTNERSHIP:
what is 11–13
evidence to establish 11–13
quasi partners, *prima facie* partners *inter se* ..... n. 11
test of participation in profits necessary to create ..... n. 12
resulting from loan, for share of profits, creates partnership *inter se*, when ..... n. 35
how established 133–147
presumption arising from proof establishing ..... 146 *et seq.*
can only be dissolved by express notice to former dealers, and the world in general 168

QUASI PARTNERS:
persons liable as, when ..... n. 84

QUARRY WORKERS:
one of firm of, cannot bind his copartners by note, unless 658

R.

RAILROAD COMPANIES:
arrangements between for pooling of earnings does not create partnership 85

RATIFICATION;
what amounts to ..... n. 1, 651
by firm of, acts of one partner 677
firm may adopt act of one ..... n. 681, n. 711

REAL ESTATE.
partnership for trading in, may exist and be established by parol 8
joint owners of, not liable as partners for contracts relating to. .... n. 9
working upon shares, does not create partnership 9, 55
rule in various cases ..... n. 217 *et seq.*
American doctrine as to ..... n. 219
title in name of one partner or stranger does not defeat ..... n. 220 *et seq.*
parol evidence sufficient to disclose title in firm ..... n. 20
surviving partner may sell, how ..... n. 228
purchased by, and for parntership purposes, how regarded n. 180, 206, n. 216–n. 228
separate shares in 290

RECEIVER·
·of the right to 580
when dissolution is intended, or has occurred 581
cases illustrating 582
when granted on application of representative of deceased partner 582
when all the partners are dead 583
when receiver will be permitted to sue 583
receiver, when appointed, instances and illustrations 583–593
distinction between applications for, and for injunctions 593
upon what the right to have a receiver depends 593
must appear that firm, or some of them, have forfeited right to manage the business 594
or that loss would result therefrom 594
or that parties have agreed thereto 594
misconduct that is deemed sufficient 595
illegality as defense to application for 596
receivers in mining partnerships 596
partnership must be established 597
of the sale of partnership property 598
method of securing appointment of receiver 600
generally not appointed until answer is in 600
when the rights of the receiver attach 601
appointment does not defeat liens previously acquired by legal process or otherwise 600
rights, powers and duties of receiver 602–609
is an officer of the court ..... n. 602–n. 606
cannot be sued or interfered with, without leave of court ..... n. 602, 607
appointment provisional only ..... n. 602

RECEIVER — *Continued.* Page.
is appointed for benefit of partners and creditors 602
appointment dates from time when inquiry as to necessity for, is ordered ..... n. 602–n. 606
property in his hands is subject to order, and is treated as in custody of the court ..... n. 602–n. 606
his general powers ..... n. 602
what property he controls 608–609
court will protect his possession of property ..... n. 608
in what stages of a suit receiver will be appointed ..... n. 604–n. 606
who can nominate ..... n. 606
must obtain leave to sue, except ..... 606 *et seq.*
order of appointment, decisive of powers 607
how title to property in his hands may be tried 607
must pay funds, under order of court 607
court will direct him to continue business in some cases ..... 607 *et seq.*
laches of receiver, how may be relieved against ..... 608; also n. 1
rule when answer denies all the equities of the bill 608
will be removed when 608
one of the partners will sometimes be appointed 609
rule when partner as receiver employs funds in business from which profits are made 609
receiver generally appointed when firm is dissolved by decree 609
rule as to appointment of, in actions to recover balances 609
when facts are doubtful 609
decree for sale of property will not be made unless 609
what decree for settlement of partnership business should show 609
appointment operates as an injunction 609

RECEIPTS:
admissible to prove partnership ..... n. 12

RECORD:
in former suits, as evidence to establish partnership 1116

REGISTERS:
of ships, and entries in custom house as evidence of partnership ... n. 1114

RELEASE:
as defense to bill for accounting 465, 20
by one partner, release by all 674
illustration of rule 674
firm bound by representations of one, when 675
power of one partner to execute 762
of one partner releases all 908
covenant not to sue, is not 977
composition deed is 975
effect of release of one ..... n. 975, n. 978, *et seq.*
must be under seal 975
plea of ..... 1091, n. 1092 *et seq.*
See ACTIONS.
as evidence to establish partnership ..... n. 1114

REMEDIES AT LAW:
by partnership creditors, pending dissolution ..... n. 190

REMEDIES, LEGAL AND EQUITABLE, BETWEEN PARTNERS: Page.
of an enforcement of covenants between partners ... 322
when covenant lies—Marshall v. Colman ... 323
when specific performance will be decreed ... 339, 384–390
covenants against engaging in other business ... 341
relative to arbitration ... 342
liquidated damages, covenants relating to ... 343–344
when such covenants not applicable ... 344
covenants are treated in equity as joint and several ... 345
illustration ... 345
equity rejects clauses not acted upon ... 347
all the covenantees must be joined as plaintiffs ... 348
when the covenants will be treated as several ... 349
illustration ... 349
number of plaintiffs may be limited by the contract ... 349
this applies only to actions between the partners themselves ... 350
right of action survives to the other covenantees ... 350
when defect of parties does not appear on face of pleadings. Rule ... 350
when courts of equity will interfere ... 351
will not restrain act approved by majority of partners unless illegal ... 352
illegal acts will be restrained ... 352
will interpose to control factious minority ... 353
will not generally interfere where complainant has been guilty of laches ... 354
rule in Sherman v. Sherman ... 354
effect of laches in certain cases ... 354
when a party is estopped from setting up laches ... 355
applicability of the doctrine to mining companies ... 356
advantages of evidence of abandonment ... 357
rule in McLure v. Ripley ... 358
cases where laches have not been regarded ... 359
recognition of a claim overcomes laches ... 362
of the rule that all proper parties must be before the court ... 362
who ought to be parties ... 363
rule when person has been induced to enter into the company by fraud. 365
suits against executors of deceased partners for fraudulent acts of deceased ... 366
rule in Mare v. Malachi ... 364
rule in Turner v. Hill ... 365
exception to the rule that all the partners must be parties to suit for a dissolution ... 366
question of parties dependent upon right to be enforced ... 367
rule when dissolution is not sought ... 368
actions to rescind illegal agreements or one illegally entered into ... 369
what must be alleged in bill filed by shareholder on behalf of himself and others ... 370
when such suits may be brought on behalf of others without their consent ... 371
of suits by and against public officers ... 372
rescission of contract ... 373
rule in Pulsford v. Richards ... 374

REMEDIES, LEGAL AND EQUITABLE, BETWEEN PARTNERS—*Cont.* Page.
rule in Jennings v. Broughton 375
rule in Robson v. Earl of Droon 375
equity will rescind contract of partnership for fraud 376
rule in Rawlins v. Wickham 377
bill to recover money invested under fraudulent representations of copartner 378
rule in MacBride v. Lindsay 380
equitable jurisdiction to rescind agreements generally 380
executors of deceased partners—powers of, in certain cases 382
members of firm cannot sue it ..... n. 322
one firm cannot sue annother of which one partner is a member ..... n. 323
exceptions to the rule ..... n. 322–n. 340
of enforcement of contracts between partners 391
when cause of action accrued before commencement of partnership 392
when the cause of action accrued after dissolution 393
when only one item is disputed 394
items due one partner wrongly carried to account of firm 395
in case of independent transaction 397
when assumpsit lies 399
particular transactions may be separated 401
illustrations—Wilson v. Cutting; Sharp v. Warren ..... 402 *et seq.*
accounting—settlement 403
in case of complete balances 403
settlement between parties—debt lies for agreed balance 404
awards 404
balance found due, when assumpsit lies for—Rackstraw v. Rackstraw .. 405
when promise implied—illustrations—Jackson v. Stoppard; Wray v. Milestone 406
contribution, when and how may be had 407
rule in Wooley v. Batte 408
cannot be had at law—Sadler v. Nixon 409
insulated transactions 415
one partner paying entire debt may sue the others for contribution 417
may proceed in equity 418
rule when partnership is dissolved 418–419
labor performed or money expended on account of firm 391
remedy at law, when may be had ..... n. 396
single transactions ..... n. 397
of partners against third persons 982–1003
See PARTNERS.
equitable against partners 1044

RENT:
taking share of profits in lieu of, does not create partnership ..... n. 9
of premises for share of profits, creates partnership when .... 58, also, n. 6
when not ..... n. 66

REPLEVIN:
one partner cannot maintain against firm ..... n. 327

REPRESENTATIVES:
of deceased partner. See EXECUTORS.
will be restrained from carrying on business in name of old firm 572

RETIRING PARTNERS: Page.
liabilities of ... 842–924
must give notice of retiracy ... 843, n. 844, *et seq.* 849
effect of notice ... 844, also n.; n. 846
as to those who have never dealt with firm ... 844, also n.; n. 846
publication of, in newspaper, effect of ... n. 848
permitting name to be used after retirement ... 852
rule as to dormant partners ... 852
liability for specialty contracts ... 853
not generally bound by new contracts—Pindar v. Wilks ... 854
not bound by instruments negotiated after dissolution — Abel v. Sutton ... 854
rule in Kilgour v. Finlyson ... 855
may give power to remaining partners to indorse in name of old firm ... 856
acceptances in name of old firm, not binding ... 856
Wrightson v. Pullan; Usher v. Dauncey ... 856
effect of dissolution upon interest of partners in the firm property ... 857
how he may be discharged from contract — Clayton's case ... 858
rule in Brooke v. Enderby ... 858
in case of a continuance of new partnership — Newmarch v. Clay ... 859
money of new partnership applicable only to debts of new firm — Thompson v. Brown ... 861
appropriation of payments by the payee — Simpson v. Ingham ... 862
contract of remaining partners to pay old debts, effect of ... 864
retiring partner becomes surety merely, for debts, when ... 865
rule in New York ... 865
when creditors accept the remaining partners — Bedford v. Deakin ... 866
when bill or note is indorsed with reservation of all rights. Featherstone v. Hunt ... 866
where the creditors accept new security — Evans v. Drummond ... 867
rule in Reid v. White ... 867
taking sole security of new firm no written security previously existing — Thompson v. Drummond ... 868
Ex parte Whitmore ... 869
rule when creditors agree that retiring partner shall be simply surety for old firm — Oakley v. Pasheller ... 870
retiring partner under some circumstances becomes surety merely ... 865
where the creditors receive interest of the new firm—Gough v. Davies, 871
when the creditor continues trading with the new firm — David v. Ellice ... 873
Lodge v. Dicas ... 874
Lodge v. Dicas and David v. Ellice, overruled by Thompson v. Percival, Kirwan v. Kirwan, and Hart v. Alexander ... 875
Thompson v. Percival ... 875
Kirwan v. Kirwan ... 876
Hart v. Alexander ... 877
money borrowed of a trustee who is a partner — Dickinson v. Lockyer, 879
retirement of partner with knowledge of firm's insolvency — Anderson v. Maltby ... 881
when purpose is to defraud creditors ... 882
Anderson v. Maltby ... 882

RETIRING PARTNERS — *Continued.* Page.
termination of liability in ordinary partnerships..... 885
termination of liability as to future acts..... 885
effect of bankruptcy, on powers of partners..... 886
retirement of dormant partner..... 887
rule in Heath v. Sansom..... 887
dissolution and notice, effect of..... 888, 889
instances where notice does not protect from liability..... 890
rights of partners after dissolution — Lyons v. Haynes, Butchart v. Dresser, Ault v. Goodrich..... 892
what amounts to notice of dissolution..... 895
liability when notice is not given..... 889
termination of liability as to past acts..... 896
how affected..... 897
payment..... 898
rule in Clayton's case..... 899
rule in Sterndale v. Hawkinson..... 900
rule in Brooke v. Enderbey..... 901
rule in Newmarch v. Clay..... 901
application of the rules adopted in the preceding cases..... 902
illustration — Beale v. Caddick..... 902
Simpson v. Ingham..... 903
partner may bind firm by assenting to transfer of debts due from or to it..... 906
illustration — Wickham v. Wickham..... 906
application of payments..... 907
release..... 908
rule in Solly v. Forbes; Price v. Baker; Hartley v. Manton..... 908
substitution of debtors and securities by agreement..... 909
agreement of creditors to look to remaining partners, is valid..... 911
cases in which a retiring partner has not been discharged, no new partner having been brought into the firm..... 911–915
cases in which a retiring partner has not been discharged, although a new partner has been brought into the firm..... 915
cases in which a retiring partner has been held discharged.....916–921
of the doctrine of merger..... 921
will be restrained from carrying on business as successor of firm....559, 572

S.

SALE:
of entire interest of one partner, dissolves firm..... n. 151
made by one partner binding on firm..... 682

SAW-MILL:
running upon shares, does not create partnership..... n. 9
partners in running, one of, cannot bind firm by note unless..... 687

SECRET PARTNERS. See DORMANT PARTNERS.

SECURITY:
for debt of firm, given by one partner discharges firm when..... n. 1095

SEPARATE CREDITORS:
general rule as to..... 966

Page.

SEPARATE TRADE:
partner cannot carry on, when 293
when does, must account for profits made in..... 293

SERVANTS:
power of one partner to employ..... 676
discharge of, by one..... 676

SERVICES:
against money or stock, as capital..... n. 1, 26
buying property with money of another for share of profits, does not create partnership..... n. 66
compensated by share of profits..... n. 68
share of profits for, does not create partnership..... 90–93
cases illustrating..... 90–93
circumstances held to constitute ..... n. 5, 91
share of profits as compensation for, does not create partnership..... 63–93
against capital, creates partnership when..... 74–84
when not..... 74–84
partner cannot recover for..... n. 391

SERVICE OF PROCESS:
of, on partners..... 1046
one may appear for all..... 1048
attachment of property of one, does not operate as service upon others 105

SET-OFF:
plea of..... 1097, also n. 3
right of..... n. 1097 *et seq.*; n. 1104
torts cannot be subject of..... 1103
must be debt due in same right..... 1103
sufficient if essentially the same..... 1104
demands essentially separate..... 1105
effect of agreement to sever..... 1105
judgments will be ordered set-off when..... 1106
See ACTIONS.
debt due from one partner, cannot be, in action by firm, or *vice versa* n. 1097, n. 1104
even though the partner against whom debt exist has agreed to allow it to be set off..... n. 1104
nor even contracted with such an understanding..... n. 1104
rule in Williams v. Brimhall..... n. 1104
exceptions to the rule..... n. 1098 *et seq.*
rule in equity..... n. 1101
Smith v. Parks..... n. 1101
Cavendish v. Geaves..... n. 1101
by and against joint-stock companies .....

SHARES:
bought with partnership money..... n. 180
in illegal company, price of, not recoverable..... n. 107
purchaser, having paid for, cannot recover back price, when..... n. 107
except when innocent purchaser..... n. 108
in joint-stock companies, sale and transfer of..... 108

Page.

SHAREHOLDERS:
in joint-stock companies, rights of ... 1269
legal remedies affecting ... 1235
liability of ... 1288
when may proceed in equity against directors ... 1283
of statutory companies ... 1302, 1307
suits in equity among ... 1307

SHERIFF:
duty of, in levying upon separate interest of one partner ... n. 192
position of purchaser of ... n. 193
holds joint possession under levy ... n. 196

SHIPS:
interest of joint owners in ... n. 180
one partner may charter, when ... 676
power to mortgage ... 676
mortgage of, power of one to make ... 676
part owners of, of the interest of ... 1169–1197
of the ship's registry ... 1173
what may be registered ... 1174
as to the declaration ... 1177
contents of certificate ... 1179
of the ship's transfer ... 1180
of the mutual rights of part owners ... 1182
rights of majority ... 1184
ship's husband ... 1185
duties of ... 1185
duty of part owners as to expenses ... 1186
rights of, between themselves ... 1187
of the relative rights of part owners and third persons ... 1188
power of agents or part owners, as to repairs ... 1191
distinction between part owners and partners ... 1193
of actions and suits by and against part owners ... 1194
See PART OWNERS OF SHIPS.

SHIP'S CREW:
receiving share of profits of voyage ... 53

SHIPMASTER:
receiving share of profits of voyage ... 53

SHIP OWNERS:
not partners with crew ... 53
partners, when ... n. 67

SIGN:
placed over door of place of business, with names of persons as partners, effect of ... n. 11

SKILL:
against money, as capital ... 25–27, n. 1, 26

SMUGGLED GOODS:
sold by firm, price not recoverable ... n. 107
sale of, by one partner, to be smuggled, cannot be recovered for by firm ... n. 290

Page.

SPECIAL PARTNERSHIP:
what is ..... n. 3

SPECIFIC PERFORMANCE:
of contract, equity will not compel, to admit stranger to firm 18
illustration—Pearce v. Chamberlain 18
in special instances, performance will be decreed ..... n. 19
of contract for partnership, will be decreed, when ..... n. 19
of contracts between partners, when decreed 275
grounds upon which decreed 275
will be decreed, when 389, 384–390
rule in Bell v. Mixborough 390

STAGE LINES:
agreement to share gross earnings of independent lines does not create partnership ..... n. 8
pooling earnings of, not partnership 85–88
agreements between owners of, that create partnership 62

STAGE PROPRIETORS:
of different lines, sharing earnings, not bound by special contract made by owners of one line, unless ..... n. 794

STATUTE OF LIMITATIONS:
plea of 1036
See LIMITATIONS.

STEAMBOAT:
part owners of, not partners ..... n. 73
arrangement between, for pooling of earnings does not create partnership, 85

STOCK:
persons furnishing distinct portions of, when not partners n. 30, n. 57, 87–90
interest of partners in ..... 179, also note 1 *et seq.*
belongs to firm ..... n. 179
purchased by one, belongs to firm, when ..... n. 179
land purchased by and used for firm ..... n. 180, 206, n. 216–n. 228
furnishing for share of profits, effect of ..... n. 78, n. 81–n. 84
cases illustrating ..... n. 82–n. 84
what is regarded as ..... n. 522
must be used to augment trade 269

STORY;
definition of partnership by 3

STRANGERS. See DELECTUS PERSONÆ.

SUB-PARTNERS:
who are ..... n. 76
when liable as partners ..... n. 76

SUB-PARTNERSHIP:
what is 44
one partner may enter into 269

SUBSTITUTION:
of partners, provision for, how construed 299
of debtors and securities ..... n. 1093
by agreement ..... n. 1093

SUITS:
Page.
in name of firm, may be brought by one 668
may be stayed or discontinued by one 668, 669
cannot consent to order submitting to arbitration 669
cannot consent to entry of judgment against 669
costs ordered paid to one partner, cannot be paid to another 669
firm cannot be sued for private debt of members of 669
service of process in suits against firm, made on one partner, not equivalent to service on all ..... 669, also n. 7

SURETY FOR FIRM:
how far affected by changes in the firm ..... n. 291

SURETY:
retiring partner becomes, for debts of old firm 864
rule in New York 865
Colgrove v. Tallman ..... n. 865

SURGEON:
selling business for share of profits, not liable as partner of purchaser, n. 84

SURVIVING PARTNER:
carrying on business with assent of executor ..... n. 30
cannot execute note in name of firm ..... n. 170
nor bind estate of deceased partner by note executed as survivor .... n. 170
duty of 271
when also executor of deceased partner 265, 271
rights of 533–535
entitled to compensation, when 533
when liable to account for profits 534
right to control of partnership stock ..... 533 *et seq.*
to collect debts due to, and pay debts due from the firm 534
must proceed to wind up the business of the firm judiciously and expeditiously 534
stands as trustee to representatives of deceased partner 534
cannot assign the property 535
rule when business is continued with assent of executor 535
entitled to possession of firm property ..... n. 950
sole power to settle and contract business ..... n. 950
business will not be taken out of hands of, except ..... n. 950
power to dispose of firm property ..... n. 951
has sole right to sue on partnership debts ..... n. 952
may sell, transfer, or pledge firm property to pay firm debts ..... n. 952
prima facie, has right to use name of old firm 572
will sometimes be restrained from carrying on business in any other name 572
in suits against, should be described as survivor 1060–1063
in suits by, should declare as survivor 1031
may include debt due to himself 1031
when should sue in his own right 1031

T.

TANNERY:
running, for share of profits ..... n. 52

Page.

TAVERN:
and farm, lease for share of profits does not create partnership..... n. 66

TEMPER:
incompatibility of, good ground for dissolution..... n. 149

TENDER:
to one partner, tender to all..... 665
plea of..... 1036, 1095
See ACTIONS.

TERM:
of partnership, relation dissolved by expiration of..... n. 151
partnership for, can be dissolved only by decree of court of equity n. 157, n. 166
or by mutual consent..... 166

THIRD PERSON:
cannot be admitted into firm, except..... n. 16, n. 19
who liable as partners, to..... n. 6, 11–n. 16
can hold person liable as partner, who is not so in fact when credit was given with knowledge of holding out..... n. 64
must have been given on his credit..... n. 64
persons held out as, may be liable as partners..... n. 6, 11–13, n. 12, 38–43 n. 64, n. 66
person liable to, as partner, when not so in fact, when..... 75
when parties liable to, as partners..... 133–147
to create liability to, must be holding out to..... 145
effect of proof of indorsement of notes, etc..... 145
interference with management of firm..... 146
presumption arising from, not overcome by proof that he is not partner in fact..... 146

TINDAL:
definition of partnership by..... 2

TORTS:
rule denying contribution between tort feasors not applicable to partners..... 480
when action for, lies against partner at suit of copartner..... 623
action of, may be brought against firm or one or more partners..... n. 1080
in case of joint..... 1107
of the evidence in actions against partners for..... 1131

TRADE SECRETS:
one partner will be restrained from divulging..... 557, 572

TRESPASS:
will not lie by one partner against copartner for taking firm property, n. 330
possible exception where property is destroyed..... n. 331
rule, when dissolution has transpired..... n. 331

TROVER:
will not lie by one partner against copartners for firm property..... n. 330
rule, after dissolution..... n. 331

TRUST:
deed of, made by one partner..... 317

TRUST FUNDS: Page.
firm not liable for wrongful use of, by one partner..... 732
cases illustrating..... 732 *et seq.*

TRUSTEE:
each partner becomes, for the others, on dissolution..... 169
person taking firm property under sale or transfer from one partner in excess of his apparent authority, is, for firm..... n. 626
and *cestui que trust*, liable as partners, when..... 628
partner employing trust funds in business of firm..... 672
of firm, heirs of deceased partner, treated as, when..... n. 801
agent, treated as, when..... n. 802
heirs of deceased partner in whom title to partnership real estate is vested, trustees of firm..... n. 801

TWO FIRMS:
as partners, duties of..... 271

U.

UNDERWRITERS:
illegally engaged in insuring ships not entitled to contribution... 114 *et seq.*
cases illustrating..... 114 *et seq.*

UNINCORPORATED COMPANIES:
treated as partnerships..... n. 4
rules applicable to..... n. 4
peculiar features of..... n. 4

UNLAWFUL:
business becoming, dissolves firm..... n. 151

USAGE:
firm bound by..... 711

USURIOUS:
contracts, or partnership..... 119 *et seq.*
cases illustrating..... 120 *et seq.*
interest, effect of taking..... 306

USURY:
contracts with partner to evade laws against, void..... 119
cases illustrating..... 120 *et seq.*

V.

VENDEE:
of interest of one partner, at sheriff's sale..... n. 193
of partner will be restrained from interfering with firm business.. 558, 573

VERDICT:
as evidence of partnership..... n. 1114
must be for or against all..... 1136

VESSEL:
sailing on shares, does not create partnership with owner..... 65
illustration..... 65–73, n. 67

W.

Page.

WAR:
breaking out of, dissolves partnership, when ..... n. 151

WARRANT OF ATTORNEY:
power of one partner to make 762

WATSON:
definition of partnership by ..... 8 *et seq.*

WHALERS:
sharing in profits of voyage, not partners ..... n. 9, n. 85

WILLFUL ACTS:
of copartner, firm not liable for 723

WILL:
partnership at, may be dissolved by any partner *ad libitum*, 148 *et seq.*, n. 155
partner cannot dissolve a partnership for a time, at ..... 421 n. *et seq.*
provision of, in, for continuance of business 964
effect of 964–966

WINDING UP:
of partnerships. See RECEIVERS; DISSOLUTION; ACCOUNTING; PARTNERS.

WINNINGS.
of horse race, sharing in, effect of ..... n. 34

WITHDRAWAL:
of partner, dissolves firm, when .....

WORKING FARM ON SHARES:
does not create partnership ..... n. 9

WRITS:
must be served on each of the partners 1048
return of *nulla bona* or *non est inventus* 1050
of *distringas* 1049

WRONG-DOERS:
rule denying contribution between, not applicable to partners 480

3 6105 062 194 340